Supreme Court, U.S.
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No. 03-_____

In The
Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GONZALO MORAN GARCIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Arvizu*, 534 U.S. 266 (2002), a trained police officer who observes a motor vehicle repeatedly swerve within its own lane of traffic late at night on a congested interstate highway may form a reasonable suspicion that the driver is intoxicated or falling asleep and, on that basis, initiate an investigatory stop of the vehicle.

2. Assuming *arguendo* that such an investigative stop violates the Fourth Amendment, whether the attenuation analysis of *Brown v. Illinois*, 422 U.S. 590 (1975), requires suppression of evidence discovered during a subsequent search of the vehicle, when the investigating officer secured the driver's voluntary consent to the search without threat or coercion in full compliance with this Court's decision in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), after advising the driver that the stop was over and he was free to leave, that he was not required to give his consent, and that he had the right to withdraw or limit his consent at any time.

STATEMENT OF INTERESTED PARTIES

All the parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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28 U.S.C. § 1257(a) 1

PETITION FOR A WRIT OF CERTIORARI

The Attorney General and Reporter of the State of Tennessee, on behalf of the State of Tennessee, respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Supreme Court in this case.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court (App. 1-30) is unreported, but it is available at 2003 WL 22247450. The opinion of the Tennessee Court of Criminal Appeals (App. 33-115) is unreported, but it is available at 2002 WL 242358. The trial court's order denying Garcia's motion to suppress is included in the appendix. (App. 116-147)

JURISDICTION

The Tennessee Supreme Court's opinion and judgment were entered on October 1, 2003. No party sought rehearing. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Respondent, Gonzalo Moran Garcia, was convicted by a Davidson County, Tennessee, Criminal Court jury in 2000 of possession of one thousand grams or more of methamphetamine with intent to deliver and sentenced to twenty years' imprisonment. In a four-to-one decision, the Tennessee Supreme Court reversed the conviction. The majority held that Officer Deborah Kohl did not have reasonable suspicion to initiate a traffic stop of Garcia's vehicle, that the detention following the stop was therefore also illegal, and that Garcia's subsequent consent to search, after being informed that the traffic stop was concluded, was tainted by the illegal stop and detention so as to require suppression of the drugs as evidence. The dissenting opinion concluded that, under the totality of the circumstances, Officer Kohl had reasonable suspicion to initiate a traffic stop.

1. At around 10:50 p.m. on May 9, 1999, Metropolitan Nashville Police Officer Deborah Kohl was parked on the side of Interstate 40/24, finishing up paperwork from a previous traffic stop. (App. 3-4) She pulled back onto the interstate into the third lane from the right, intending to head east on Interstate 40. However, out of the corner of her eye, she noticed Garcia's car, two lanes to her right, suddenly swerve onto the white fog line. She changed lanes to get behind Garcia and followed him as he headed south on I-24. She observed Garcia's car weaving within

the lane of traffic several times and, suspecting that the defendant might be intoxicated or falling asleep and concerned for his safety and the safety of other motorists, she initiated a traffic stop. (App. 4)

Upon approaching Garcia's car and, after he rolled down his tinted window, Officer Kohl observed that the interior of the car was littered with soft drink cans and half-eaten sandwiches. She also observed a can of air freshener in the car, which her training had taught her was frequently used by drug couriers to mask the odor of drugs. (App. 10) She asked Garcia to exit the vehicle and informed him in Spanish that she was a police officer and that she had stopped him because he was weaving. Garcia repeated, "I was weaving," in English, so Officer Kohl continued the conversation in English. (App. 4) She asked Garcia if he had been drinking; he denied having been drinking but admitted that he was very tired because he had driven nearly non-stop from California on his way to visit a cousin in Georgia. However, he did not know where exactly in Georgia he was going and explained that he only had a pager number to call when he got close. When asked who owned the vehicle, Garcia first said that he had borrowed it, that it belonged to his cousin, then said that the owner was not really his cousin, then said that he was a "friend who was like a cousin," and then finally said that the car belonged to a friend of a friend at work. (App. 4, 37, 124)

Officer Kohl was satisfied that Garcia was not intoxicated, but she now suspected that he was transporting drugs. She took Garcia's license and returned to her car, where she filled out a warning ticket and a consent-to-search form in Spanish. She called for a drug dog as well. (App. 5-6)

She exited her car, returned Garcia's license to him, and told him that the traffic stop was over. (App. 6) As Garcia approached his car door, Officer Kohl approached and asked him if she could ask a couple of questions. Garcia walked back to the rear of the car to answer Officer Kohl's questions. He denied having any weapons, but, when asked if he had any drugs, his demeanor changed and he became "fidgety." (App. 6)

Officer Kohl asked if she could search his vehicle, and Garcia offered to open the trunk for her. (App. 6-7) Officer Kohl declined the offer but asked Garcia if he could read in Spanish. He said he could, whereupon Officer Kohl asked him to read the consent-to-search form, which informed him that he could refuse the search, limit the search, or revoke his consent at any time. Garcia signed the consent form without any reservations. (App. 7)

By this time, another officer had arrived with a drug-detection dog and approached the vehicle. Before the officer had an opportunity to "set up" the dog, the dog "alerted" on the passenger side of the vehicle. As the walk-around proceeded, the dog "alerted" three times on the driver's side and once on the passenger side. (App. 7-8) An ensuing search revealed approximately 40.1 pounds of methamphetamine in 28 duct-taped bundles hidden in the rocker panels beneath the doorsills of the car. At trial, Garcia again reiterated that he knew that he did not have to consent to the search and could have withdrawn or limited his consent at any time. He explained that he had no reason to do so since he had just borrowed the car and had no idea drugs were hidden in the car. (App. 152-157)

2. Garcia filed a motion to suppress both the methamphetamine found in the car and the statements he

made to the officer during the stop. (App. 8-9, 116-147) Among other things, the motion argued that the stop was illegal and that the ensuing search was beyond the scope of Garcia's consent. The trial court conducted an evidentiary hearing, at which Officer Kohl testified, as summarized above. In addition, a videotape of the stop was introduced. Following the hearing, the trial court determined that Officer Kohl's seizure of Garcia was based upon reasonable suspicion that he was driving under the influence of an intoxicant. In this regard, the court accredited Kohl's testimony, observing:

> The Court has reviewed the video tape recorded by Officer Kohl and *finds that it does support her testimony*. As she approaches the defendant's vehicle from two lanes over, it noticeably swerves to the right side of the lane. . . . In reviewing the video, the Court noted two other times, approximately 20 and 65 seconds from the officer's initial observation (according to the time indicated on the video), that the defendant's vehicle noticeably swerves from one side of the lane to the other. Also significant, and *in further support of the officer's testimony*, is the fact that there were several other vehicles traveling parallel to and in close proximity to the defendant's vehicle. This supports her testimony regarding the safety of the other motorists on the road. *In addition, the Court would note that for a short period of time the defendant's vehicle is not on video tape and could only have been observed by the officer. During this occasion and the initial observations made at the time when the defendant's vehicle was several car lengths ahead of the officer's, only the officer, not the video tape, could accurately observe the defendant's driving pattern. . . . Therefore, the Court credits the testimony of Officer*

Kohl and finds that the stop was based upon reasonable suspicion.

(App. 132-133) (footnotes omitted) (emphasis added) The court further concluded that the initial search of the vehicle was based upon consent and that the extended search of the vehicle's exterior rocker panels was based upon consent and probable cause. (App. 140-141)

3. The Tennessee Court of Criminal Appeals reversed the conviction for reasons unrelated to the search of Garcia's vehicle, but it affirmed the trial court's order declining to suppress the drugs and remanded the case for a new trial. The intermediate appellate court held that Officer Kohl lacked reasonable suspicion to stop the defendant's car and that the length of the detention was in excess of that needed to ascertain that the defendant was not intoxicated. (App. 59-80) However, the court concluded that the illegal stop and detention did not require suppression because Garcia's subsequent voluntary consent to a search of the vehicle purged the taint of the prior illegality. (App. 85-90)

4. Relying on *Terry v. Ohio*, 392 U.S. 1, 20-21, (1968) and *Alabama v. White*, 496 U.S. 325, 330 (1990), for the proposition that the Fourth Amendment permits an investigative stop on reasonable suspicion that a criminal offense has been or is about to be committed, based on specific and articulable facts under "the totality of the circumstances," four members of the Tennessee Supreme Court, after independently reviewing the videotape, held that the totality of the circumstances did not provide reasonable suspicion for Officer Kohl to stop the defendant's

car.[1] (App. 14-19) The court opined that, "despite the testimony of Officer Kohl, we are unable to detect any weaving . . . " and further elaborated:

> Prior to Officer Kohl's stop of the defendant, the videotape reveals that Garcia was traveling at what appears to be a safe rate of speed in the far right lane of an interstate highway. The videotape also reveals that Garcia slowly moved his vehicle slightly within his lane of travel approximately twice over a period of approximately two minutes. At no point does the vehicle exhibit any sharp or jerking movements. While there is a short period of time when the vehicle is not visible on the videotape, we find no testimony in the record suggesting that the defendant exhibited any pronounced or exaggerated swerving during that brief time period. Moreover, we place little weight on the fact that there was considerable traffic on the interstate on the night of the defendant's traffic stop. The videotape reveals that several cars approached the defendant from the rear and easily passed his vehicle by moving to the next lane.
>
> . . .

[1] Although the Tennessee Supreme Court referred to state court decisions in its majority opinion, it noted that "Article I, section 7 of our state constitution 'is identical in intent and purpose with the Fourth Amendment.'" (App. 14-15) Thus, the court's decision did not rest on adequate and independent state grounds. *See Pennsylvania v. Muniz*, 496 U.S. 582, 588, n.4 (1990) (no adequate and independent state ground where the court states that state and federal constitutional protections are "identical").

> [W]e conclude that the trial court's findings of fact at the suppression hearing are not supported by the preponderance of the evidence. Accordingly, we hold that as a matter of law there was no reasonable suspicion to stop Garcia. While the defendant's driving may not have been perfect, we saw no evidence of weaving on the videotape, and we reiterate that "it is the rare motorist indeed who can travel for several miles without occasionally varying speed unnecessarily, moving laterally from time to time in the motorist's own lane, nearing the center line or shoulder, or exhibiting some small imperfection in his or her driving."

(App. 18-19) (citations omitted) The dissenting opinion concluded that Officer Kohl's testimony regarding the defendant's erratic driving, considered along with the fact that the defendant was driving on a busy interstate highway, provided reasonable suspicion to stop the defendant. (App. 26-30)

As to the attenuation issue, the majority opinion relied on this Court's decisions in *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Brown v. Illinois*, 422 U.S. 590 (1975). While acknowledging that *Brown*'s analysis was designed to aid courts in determining whether a confession was obtained by exploitation of an illegal arrest, the court nevertheless applied the three factors articulated in *Brown* to determine whether the defendant's consent to search was the product of the illegal stop and detention: (1) the temporal proximity of the illegal seizure and consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. (App. 19-25)

Regarding the first *Brown* factor, the court held that there was insufficient time between the end of the illegal detention and the defendant's consent to allow the taint of the prior misconduct to dissipate. (App. 21-22) Regarding the second *Brown* factor, the court held that Officer Kohl's statement to the defendant, informing him that the traffic stop was over, did not constitute a sufficient intervening circumstance. Although noting that the defendant had unequivocally admitted that his consent to search was voluntarily given with a full understanding of his right to refuse to consent, the court discounted this admission because "ordinary people never feel free to terminate a conversation with a police officer." (App. 22-23) Finally, regarding the third *Brown* factor, the court held that, even if the stop was justified, Officer Kohl had purposefully detained the defendant to obtain his consent to search his car. (App. 23-25) Accordingly, the court held that the evidence seized from the vehicle must be suppressed.

REASONS FOR GRANTING THE WRIT

I. THE TENNESSEE SUPREME COURT'S HOLDING THAT THE POLICE LACKED REASONABLE SUSPICION TO STOP RESPONDENT GARCIA'S VEHICLE CONFLICTS WITH THIS COURT'S DECISIONS IN *TERRY V. OHIO* AND *UNITED STATES V. ARVIZU,* AS WELL AS THE DECISIONS OF OTHER JURISDICTIONS.

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court held that the Fourth Amendment's proscription against unreasonable searches and seizures was not violated by a brief investigative seizure, so long as the government had a legitimate interest involved, *e.g.*, crime prevention, and

the seizure was instigated based on specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Id.* at 21. To determine the constitutionality of a seizure, a court must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983). *See also Delaware v. Prouse*, 440 U.S. 648, 654 (1979) ("the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"). The test is an objective one, made "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Terry*, 392 U.S. at 20-22.

In *United States v. Arvizu*, 534 U.S. 266 (2002), this Court reaffirmed this balancing test for brief investigatory stops of persons or vehicles that fall short of traditional arrest and reiterated that "the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity" "'may be afoot.'" 534 U.S. at 273 (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)) (quoting *Terry*, 392 U.S. at 30)). Courts must apply a "totality of the circumstances" approach when deciding whether an officer had a "particularized and objective basis" for suspecting wrongdoing, as opposed to an "unparticularized hunch." *Id.* In making this determination, courts must not use a "divide and conquer" approach by separately analyzing each reason relied on in support of initiating the stop but must consider whether an investigative stop was warranted based on all of the officer's reasons, considered as whole. *Id.* at 274-275. "This

process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Arvizu*, 534 U.S. at 273-74 (citations omitted). This Court further instructed that "reviewing courts must give 'due weight' to factual inferences drawn by resident judges and local law enforcement officers." *Id.*

The Tennessee Supreme Court's majority opinion conflicts with *Arvizu* and *Terry* in several respects. First, the majority held that the defendant's driving, which it conceded "may not have been perfect," did not provide Officer Kohl reasonable suspicion to stop Garcia. (App. 19) However, this characterization effectively concedes that Officer Kohl's reason for stopping Garcia was not a "hunch" but was based on articulable facts.

Second, although the court's opinion paid lip service to the "totality of the circumstances" standard, it disregarded it as a practical matter. The court began by remarking that "we are unable to detect any weaving" on the videotape of the stop, thus discounting Officer Kohl's testimony regarding the defendant's driving and the late hour, instead selectively focusing on the videotape, which only showed a portion of the time frame involved and which, as the minority opinion observed, is "dark, indistinct, and mainly consists of diffused light." (App. 17, 27) By discounting the testimony of Officer Kohl, an eleven-year veteran with specialized training in the field of highway drug interdiction, and by wholly ignoring the trial court's decision to accredit that testimony, the majority opinion violated this Court's injunction in *Arvizu* that reviewing courts must permit law enforcement officers to make deductions based on their training and experience, should

afford due weight to factual inferences drawn by officers on the scene, and should respect well-considered findings of fact made by trial court judges based upon all of the evidence presented. *Id.* at 274.

Moreover, while conceding that there is a short period of time when Garcia's vehicle is not visible on the videotape, the Tennessee Supreme Court baldly inserted its own on-the-scene assessment into the totality-of-the-circumstances equation, flatly declaring that "Garcia was traveling at what appears to be a safe rate of speed" and that "we place little weight on the fact that there was considerable traffic on the interstate on the night of the defendant's traffic stop." (App. 17-18) This "divide and conquer" approach, by which each fact in the equation is independently disparaged but the significance of all of the evidence considered in its entirety is plainly ignored, was expressly rejected in *Arvizu*.

Finally, the court observed that "it is a rare motorist indeed who can travel for several miles without occasionally varying speed unnecessarily, moving laterally from time to time in the motorist's own lane, nearing the center line or shoulder, or exhibiting some small imperfection in his or her driving." (App. 19) Thus, ignoring this Court's admonition that "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct," 534 U.S. at 277, the court implies that Officer Kohl lacked a reasonable suspicion because Garcia's erratic driving may have been simply a manifestation of imperfect human behavior. Of course, in considering the totality of the circumstances, it was equally reasonable for Officer Kohl to conclude that Garcia may have been impaired, sick, or falling asleep at the wheel.

The Tennessee Supreme Court erred by substituting its own assessment of the facts for the inferences drawn by the officer at the scene and by the trial court. For example, while acknowledging that "there is a short period of time when [Garcia's] vehicle is not visible on the videotape" (App. 18), the court nevertheless finds a lack of reasonable suspicion based upon its own assessment of the videotape: "[*W*]*e* are unable to detect any weaving. . . . " (App. 17) (emphasis added) Yet Officer Kohl clearly testified that it was Garcia's initial sudden veering to the right and then swerving to the left that first caught her attention (App. 117), and the trial court's finding plainly rested on the fact that

> for a short period of time the defendant's vehicle is not on video tape and could only have been observed by the officer. During this occasion *and the initial observations made at the time when the defendant's vehicle was several car lengths ahead of the officer's, only the officer, not the video tape, could accurately observe the defendant's driving pattern*. . . .

(App. 132) (emphasis supplied) Such disregard for the factual inferences drawn by resident judges and local law enforcement officers contravenes this Court's injunction to give "due weight" to such findings of fact and the law enforcement officer's inferences from and deductions about the cumulative information available to them based on their experience and specialized training. *Arvizu*, 534 U.S. at 273.

The decision below likewise conflicts with numerous decisions from other jurisdictions. Officer Kohl's testimony, expressly accredited by the trial court, established that Garcia's vehicle was weaving within its own lane of traffic

in a continual manner. This observation alone constituted a specific, articulable fact giving rise to a reasonable suspicion for initiating a stop. *United States v. Harrison*, 103 F.3d 986, 989 (D.C. Cir. 1997) (reasonable suspicion of driving under the influence where officer observed car "touch the right lane marking and then touch the left lane marking"); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171, 175 (Ariz. 1986) (weaving within lane sufficient to justify stop); *People v. Diaz*, 247 Ill. App. 3d 625, 617 N.E. 2d 848, 851 (1993) ("weaving within a single lane" sufficient to justify stop); *State v. Field*, 252 Kan. 657, 847 P.2d 1280, 1285 (1993) (the repeated weaving of a vehicle within its own lane may constitute sufficient reasonable suspicion for an officer to stop and investigate the driver of the vehicle); *State v. Huckin*, 847 S.W.2d 951, 954 (Mo. Ct. App. 1993) ("drifting" or "weaving" within own lane sufficient to support reasonable suspicion); *State v. Thomte*, 226 Neb. 659, 663, 413 N.W.2d 916, 919 (1987) (a vehicle's weaving twice in its own lane of traffic over the course of one mile provides reasonable suspicion for an investigation regarding the driver's condition); *State v. Dorendorf*, 359 N.W.2d 115, 117 (N.D. 1984) (car's weaving within its own lane of traffic is sufficient reason to stop for investigation); *People v. Gedeon*, 81 Ohio App. 3d 617, 611 N.E.2d 972, 973 (1992) ("weaving within one's lane alone presents a sufficient scenario for an officer to conduct an investigative stop").

But Officer Kohl's decision to stop the vehicle did not rest on its weaving alone. Based on her experience as an eleven-year veteran police officer, she suspected that the driver might be intoxicated or falling asleep. (App. 117-118) In addition, there was a considerable amount of traffic on the interstate highway, even at 11:00 p.m. on a

Sunday, with a number of vehicles braking as they approached Garcia's car before passing, thus providing a reasonable basis for Officer Kohl's concern for the safety of other motorists as well as the driver. (App. 117)

The question before the Tennessee Supreme Court was not whether the facts known to Officer Kohl constituted probable cause for an arrest or search (they did not) or whether the number or severity of the swerves individually supported reasonable suspicion or were inconsistent with an innocent explanation. The question, instead, was whether the totality of the circumstances articulated by Office Kohl and the trial court justified a brief stop of the vehicle to investigate. They did. Because the decision below is at odds with this Court's settled precedent construing the requirements of the Fourth Amendment and conflicts with the decisions of numerous other jurisdictions, review by this Court is warranted.

II. ASSUMING ARGUENDO THAT THE STOP VIOLATED THE FOURTH AMENDMENT, THE TENNESSEE SUPREME COURT ERRED IN APPLYING *BROWN V. ILLINOIS* RATHER THAN *SCHNECKLOTH V. BUSTAMONTE* FOR PURPOSES OF DETERMINING WHETHER THE EVIDENCE SEIZED FROM GARCIA'S VEHICLE SHOULD BE SUPPRESSED.

After the traffic stop was concluded, Officer Kohl gave Garcia a warning citation, thanked him, and informed him that "the stop's complete" and that he was free to leave. Garcia later testified that he understood that he was free to leave. When their ensuing verbal exchange betrayed unusual nervousness on Garcia's part, Officer Kohl asked him if she could search the vehicle. Garcia agreed, without

imposing any limitations, carefully reading and then signing a consent-to-search form, written in Spanish, which told him that he had a right to limit the search and revoke the consent. Garcia testified at trial that his consent was voluntary and that he knew he could have stopped the search at any time but did not do so because he had no reason to. In fact, throughout his trial Garcia consistently maintained that his voluntary consent corroborated his contention that he was wholly unaware that the vehicle contained drugs hidden beneath the rocker panels. Thus, even assuming that the investigative stop of Garcia was unlawful, there is no serious question that under the totality of the circumstances Garcia's consent was "in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

Relying on a premise that "ordinary people never feel free to terminate a conversation with a police officer" (App. 23),[2] and without addressing *Schneckloth*, the Tennessee Supreme Court launched into an attenuation analysis under *Brown v. Illinois*, 422 U.S. 590 (1975), which involved an in-custody, jailhouse confession tainted by an illegal arrest, and ultimately concluded that the drugs seized from Garcia's vehicle must be suppressed "because the consent was not sufficiently attenuated from the unlawful detention." (App. 25) This case presents an

[2] Indeed, the Tennessee Supreme Court's premise directly conflicts with this Court's observation in *Schneckloth* that, "because the specter of incommunicado police interrogation in some remote station house is inapposite," there is "no reason to believe that the response to a policeman's question is coerced" during an investigative stop of a motor vehicle. *Schneckloth*, 412 U.S. at 247.

opportunity for this Court to address the question whether the suppression of seized evidence following a traffic stop is required when, notwithstanding the prior illegal detention, the defendant's consent was "in fact voluntarily given" and was "not the result of duress or coercion, express or implied." On this question, the courts, both state and federal, have reached divergent conclusions.

The Eighth Circuit has adopted the position that a voluntary consent itself is sufficient to dissipate the taint of a prior illegal stop and does not apply *Brown*. *See, e.g.*, *United States v. Beason*, 220 F.3d 964, 967 (8th Cir. 2000). The Tenth Circuit has adopted a middle position, allowing voluntary consent to be an "intervening circumstance," while still applying the other *Brown* factors. *See, e.g.*, *United States v. Melendez-Garcia,* 28 F.3d 1046, 1053-56 (10th Cir. 1994). The other courts of appeals addressing the issue apply the *Brown* attenuation analysis *in addition to* requiring a voluntary consent to search under *Schneckloth*. *See, e.g.*, *United States v. Jones*, 234 F.3d 234, 243 (5th Cir. 2000); *United States v. Lopez-Arias,* 344 F.3d 623, 629-30 (6th Cir. 2003); *United States v. Twilley,* 222 F.3d 1092, 1097 (9th Cir. 2000); *United States v. Valdez*, 931 F.2d 1448, 1451-52 (11th Cir. 1991). Similarly, in contrast to the Tennessee Supreme Court's adoption of the *Brown* analysis, some state courts have declined to apply the attenuation analysis, concluding instead that a voluntary consent is decisive. *See, e.g.*, *State v. Angel*, 356 So.2d 986, 989 (La. 1978); *McMillian v. State*, 85 Md. App. 367, 584 A.2d 88, 94-99 (Ct. Spec. App. 1991), *rev'd on other grounds*, 352 Md. 272, 600 A.2d 430 (Md. App. 1992).

As these decisions from across the country demonstrate, the fact pattern presented by this case – the search

of a motor vehicle with the driver's consent after an assertedly illegal *Terry* stop – frequently recurs, and there is a split of authority among the lower courts concerning the relevance of *Brown* to the attenuation-of-taint inquiry in such cases. In petitioner's view, *Schneckloth,* not *Brown,* should govern that inquiry. While the *Brown* factors are well-suited to the purpose for which they were designed, *i.e.*, to determine whether an illegal arrest has been unduly exploited by the police to obtain a confession, the considerations underlying two of the three *Brown* factors are largely inapposite when the question is whether a consent to search has been tainted by an illegal *Terry* stop.

For example, the "temporal proximity" of an illegal arrest to the arrestee's subsequent confession bears directly on the strength of the link between the two events, because "the compulsion inherent in custodial surroundings," *Schneckloth*, 412 U.S. at 247 (quoting *Miranda v. Arizona*, 384 U.S. 436, 458 (1966)), makes it far more likely that statements made at or near the time of the arrest are not "sufficiently a product of free will . . . [to] break, for Fourth Amendment purposes, the causal connection between" them. *Brown*, 422 U.S. at 603. However, that factor is of virtually no utility for purposes of assessing whether an illegal *Terry* stop has been exploited to procure a consent to search. In the first place, a *Terry* stop is by definition of brief duration, typically lasting no more than a few minutes. Moreover, the slight interference with personal liberty occasioned by an investigatory stop does not give rise to any "inherently compelling pressures which work to undermine the individual's will to resist and to compel . . . [his consent] where he would not otherwise do so freely." *Schneckloth*, 412 U.S. at 247 (quoting *Miranda*, 384 U.S. at 467). Consideration of the time

elapsed between the commencement of an illegal stop and a consent to search thus adds nothing to the analysis of whether the latter was the product of the former.

The third *Brown* factor – "the purpose and flagrancy of the official misconduct" – is likewise inapposite to the illegal stop/consent search context. As Justice Powell, joined by now Chief Justice Rehnquist, observed in his concurring opinion in *Brown*, "[t]here are . . . significant practical differences that distinguish among [Fourth Amendment] violations, differences that measurably assist in identifying the kinds of cases in which disqualifying the evidence is likely to serve the deterrent purposes of the exclusionary rule." *Brown*, 422 U.S. at 609 (Powell & Rehnquist, JJ., concurring). Thus, "the nature of the taint" produced by a particular violation should govern "the point at which the taint [from that violation] can be said to have dissipated." *Id.* "The nature of the taint" produced by the vast majority of illegal stops will be slight at the very worst, however. In stark contrast to the public embarrassment and complete deprivation of liberty caused by a full-blown custodial arrest of the sort at issue in *Brown*, a *Terry* stop involves only a temporary, minimal intrusion upon personal freedom of movement. Thus, the less demanding standard that the police must satisfy in order to initiate a *Terry* stop – a mere reasonable suspicion that wrongdoing may be afoot – can be explained by the relative insignificance of the injury to Fourth Amendment values threatened by police error in applying that standard. In sum, the magnitude of the constitutional harm produced by an illegal stop can rarely, if ever, be said to rise to the level of "flagrancy."

The totality of the circumstances test adopted by the Court in *Schneckloth* for measuring the voluntariness

consents to search provides a better method than *Brown* for determining whether such a consent given after an illegal *Terry* stop was "sufficiently an act of free will to purge the primary taint" of the prior illegality. *Wong Sun*, 371 U.S. at 486. The goal of the *Schneckloth* test is to ascertain whether a particular consent "was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248. When as in this case the consent passes that test, there should be a high degree of confidence that the police have not unconstitutionally exploited their prior misconduct to obtain it, in other words, that the suspect's decision to give consent was "an intervening act of free will," *Wong Sun*, 371 U.S. at 486, rather than the product of a constitutional violation. Indeed, the opposite conclusion can be justified only by invoking the "but for" rule of causation that has repeatedly been rejected by this Court in attenuation-of-taint cases dating back to *Wong Sun*. The Court should grant review in this case to resolve the question whether a consent to search secured in compliance with *Schneckloth* "mark[s] the point at which the detrimental consequences of . . . [an illegal *Terry* stop] become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown*, 422 U.S. at 609 (Powell & Rehnquist, JJ., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
May 28, 2003 Session Heard at Cookeville

STATE OF TENNESSEE v.
GONZALO MORAN GARCIA

Appeal by permission from the Court of Criminal Appeals,
Criminal Court for Davidson County
No. 99-C-2220 Steve Dozier, Judge

No. M2000-01760-SC-R11-CD

(Filed Oct. 1, 2003)

The defendant, Gonzalo M. Garcia, was convicted in the Criminal Court for Davidson County of possession of one thousand grams or more of methamphetamine with intent to deliver. We granted this appeal to determine whether the evidence obtained as a result of the stop should have been suppressed. After examining the facts and law relevant to the issues, we hold that the defendant's traffic stop was not based upon reasonable suspicion, in violation of the Fourth Amendment to the Federal Constitution and Article I, section 7 of the Tennessee Constitution. We also hold that the evidence in this case must be suppressed because the defendant's consent to search his vehicle was not sufficiently attenuated from his unlawful detention.[1]

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[1] Oral argument was heard in this case on May 28, 2003, in Cookeville, Putnam County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Criminal Appeals Affirmed in Part and Reversed in Part.

WILLIAM M. BARKER, J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., E. RILEY ANDERSON, and ADOLPHO A. BIRCH, JR., JJ. joined. JANICE M. HOLDER, J. filed a dissenting opinion.

Richard M. McGee and James O. Martin, III, Nashville, Tennessee, for the appellant, Gonzalo Moran Garcia.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Daryl J. Brand, Associate Solicitor General; Victor S. Johnson, III, District Attorney General; and John Zimmerman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

At approximately 10:50 p.m. on May 9, 1999, the defendant, Gonzalo M. Garcia, was stopped in his vehicle by Officer Deborah Kohl of the Metropolitan Nashville ("Metro") Police Department while driving on Interstate Highway 24 in Nashville, Davidson County, Tennessee. During the traffic stop, Metro police officers seized 40.1 pounds, or approximately 18,200 grams, of methamphetamine. On September 24, 1999, a Davidson County Grand Jury issued an indictment charging the defendant with one count of possession of one thousand grams or more of methamphetamine with intent to deliver. Prior to trial, the defendant filed a motion to suppress any evidence obtained as a result of the traffic stop. The trial court denied the motion, and the Court of Criminal

Appeals upheld that ruling. We granted review in this case to determine whether the lower courts erred by refusing to suppress the evidence. Accordingly, our factual background will be limited to the relevant portions of the suppression hearing and the trial.

At the suppression hearing, Officer Kohl testified that she had been with the Nashville Police Department for eleven years and was currently assigned to the Twentieth Judicial District Drug Task Force and had been so assigned for approximately eight months before the traffic stop in this case. She also testified that she had received specialized training in the field of highway drug interdiction at conferences organized by the United States Custom Service and the Drug Enforcement Administration. Additionally, Officer Kohl stated that she had trained for a week in El Paso, Texas with the United States Custom Service and that she had attended other conferences on highway drug interdiction in Nashville and Memphis.

Officer Kohl testified that on the evening of the traffic stop in this case, she had just completed an unrelated traffic stop and began traveling east on Interstate Highways 40 and 24 in a marked police cruiser. While driving in the center eastbound lane, Kohl testified that as she began to overtake the defendant's car, which was in the far right lane, she noticed that the defendant's car "was swerving in its lane of traffic." She then pulled in behind the defendant's vehicle in order to observe its actions. Officer Kohl stated that vehicle's erratic behavior continued:

> The vehicle would drive in its lane – it stayed in its lane of traffic; but, as the vehicle was going in its lane of traffic, it would swerve over to the

> right-hand marker, then it would swerve over to the left-lane marker.
>
> And I became concerned for his safety, as well as the safety of other motorists, and decided to stop the vehicle, at that point in time.

Among other possibilities, Officer Kohl stated that she suspected that the driver of the vehicle may have been intoxicated.

Upon stopping the defendant's vehicle, a white Pontiac Bonneville, Officer Kohl exited her vehicle and approached the defendant's vehicle on the passenger side. Upon reaching the passenger door, she motioned for the defendant to roll down the window, which he did. Because the defendant appeared puzzled when she identified herself as a Nashville Metro Police Officer, Officer Kohl stated that she asked the defendant if he spoke Spanish, to which he replied, "Yes." Kohl then requested the defendant to exit the car and follow her to the rear of the vehicle. Officer Kohl told the defendant in Spanish: "I'm a police officer in Nashville, Tennessee. The reason I stopped you was for a moving violation. The moving violation was weaving." At that point, Kohl testified that the defendant replied, in English, "I was weaving." Because the defendant was responsive to English, the remainder of the conversation between Kohl and the defendant was in English.

After explaining to the defendant the reason he had been pulled over, Officer Kohl asked him if he had been drinking alcohol. The defendant answered no, and Kohl testified that the defendant's actions were not consistent with his being intoxicated. In fact, Kohl testified that two minutes into the traffic stop, she was satisfied that the

defendant was not intoxicated. Moreover, she admitted that she did not witness the defendant speed, drive too slowly, cross any lanes of traffic, illegally pass another vehicle, follow too closely, commit a violation regarding use of the turning signal, or drive on the shoulder. After the defendant denied drinking alcohol, Kohl asked him if he was tired. The defendant explained to Kohl that he was tired because he had left Los Angeles, California, the day before and only briefly stopped at rest areas to sleep. Kohl asked the defendant about his destination, and he explained that he was traveling to Georgia. Kohl testified that the defendant gave inconsistent answers concerning who owned the vehicle and where he was going. However, the car was not stolen and the registration matched the vehicle. At the suppression hearing, Kohl could not recall whether the name on the vehicle registration was the same name that the defendant claimed was the owner. After obtaining the vehicle registration and the defendant's driver's license, Kohl asked the defendant about his driving record and arrest record. The defendant claimed that his driving record was "good," although he admitted that he had one arrest for driving under the influence.

After examining the defendant's license and vehicle registration, Kohl informed him that she was going to issue him a warning citation. Kohl advised the defendant that the warning citation would not carry a monetary fine, nor require him to come to court, nor affect his driving record. Kohl also gave the defendant directions to a location where he could park his vehicle and rest. She instructed the defendant to wait in his vehicle until she finished writing the citation. While retaining the defendant's license and registration, Kohl proceeded to her

patrol car, where she radioed for a fellow officer to transport a drug-detection dog to the scene. Afterwards, Kohl prepared a warning citation for a violation of "lane restrictions," and also wrote out a "Consent to Search" form in Spanish before returning to the defendant's vehicle.

When Officer Kohl approached the defendant, she beckoned him to get back out of the vehicle. When he complied, Kohl returned to the defendant his driver's license, the vehicle registration, and the warning citation. After explaining to the defendant that when he was tired, he needed to take a coffee or sleep break, Officer Kohl thanked the defendant and told him, "The stop's complete." When the defendant began to walk towards his car, Officer Kohl turned as though to return to her vehicle. However, she promptly turned around and asked the defendant if she could ask him a few questions. When the defendant returned to Kohl's location at her direction, Kohl asked him if he had any weapons or long-bladed knives in his vehicle. The defendant replied, "No." Kohl then asked the defendant if he had any illegal drugs in the vehicle. Officer Kohl testified:

> At this point in time, his demeanor changed. He gave me a – a nervous, laughing, "No." And he – he became fidgety. You could see him scratching on his back. He was nervous and you could literally see his Adam['s] apple, a nervous sign, bobbing up and down, when I was talking to him, which, to me, is an indicator of some type of deception.

Officer Kohl then asked the defendant for permission to search his vehicle. Kohl claimed that the defendant promptly invited Kohl to inspect the trunk. Kohl declined and asked the defendant if he could read in Spanish.

When the defendant responded that he could read in Spanish, Kohl asked him to read the "Consent to Search" form that she had prepared. She testified that "[a]s he read, you could follow his finger going along each sentence, which, to – to me, demonstrated that he was actually reading the statement." The consent form indicated that the defendant had the right to refuse consent, the right to limit consent to certain portions of the vehicle, as well as the right to revoke his consent at any time. The defendant printed his name on the consent form and then signed it.

Subsequently, Officer Dean Hunter, who had arrived shortly beforehand, permitted his drug-detection dog, Lou, to smell around the vehicle. The dog indicated that it detected the presence of illegal drugs on both the driver and passenger side of the vehicle. Because the drug-detection dog indicated a positive response, Officers Kohl and Hunter began to search the vehicle while the defendant remained a short distance away with another police officer who had also arrived on the scene. Kohl recalled that while examining the interior of the vehicle, Officer Hunter noticed that the vehicle's rocker panels[2] had a fresh coat of paint that looked different than the paint on the rest of the vehicle. Officer Hunter removed the molding that covered the rocker panel and inserted a probe into the pre-existing screw holes. Around one-half inch into the holes, he met some moderate resistence. Hunter then inserted a drill into the holes, and the drill caused some "white-terry-cloth material" to exit the holes. Realizing

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[2] A "rocker panel" is defined as "the portion of the body paneling of a vehicle that is situated below the doorsills of the passenger compartment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1965 (1993).

that the cloth material should not be in the rocker panel, Kohl retrieved a "buster" or a density meter and measured the density of the rocker panels. Kohl recalled: "I got a real high [density] rating, a reading of a sixty-eight which told me that there was something inside of [the rocker panel]. A normal reading should be, I would say probably, a twenty, twenty-five, something like that."

Following the high density reading, the officers drilled holes into the rocker panels, resulting in "a pinkish-brown-type material" exiting the drill bit. Kohl testified that the officers tested the material for the presence of cocaine but received negative results. Despite the negative result from the cocaine test, Kohl claimed that "we knew something was there that didn't belong there." Thereafter, officers used a hammer to break the rocker panels open, where they found "duct-taped bundles" inside the rocker panels. Officer Kohl then placed the defendant under arrest. Laboratory testing revealed that the bundles contained 40.1 pounds, or approximately eighteen thousand grams, of methamphetamine.

At the conclusion of Officer Kohl's direct examination, the State introduced a video tape of Kohl's traffic stop of the defendant. The audio portion of the video tape is indiscernible. Kohl stated that after the traffic stop, she discovered the battery which powered the audio equipment was dead. Additionally, the State introduced into evidence, without objection, a certified copy of Metropolitan Nashville Code section 12.68.170, entitled "Careless driving." Section 12.68.170 provides:

> A. Every person operating a vehicle upon the streets within the metropolitan government, or any private road or driveway or parking area, shall drive the same in a careful and prudent

> manner, having regard for the width, grade, curves, corners, traffic and use of these streets and private areas, and all other attendant circumstances, so as not to endanger the life, limb or property of any person. Failure to drive in such manner shall constitute careless driving and a violation of this chapter.

At the close of the State's evidence, the defendant testified through an interpreter. The defendant's testimony at the suppression hearing was limited to establish his standing to contest the search of the vehicle which he was driving on May 9, 1999. Garcia claimed that the owner of the vehicle, Efrain Orosco, had given him permission to drive it while Orosco was away on vacation to Mexico. Moreover, the defendant claimed that Orosco knew that the defendant was planning a vacation to Georgia and had given him permission to drive the vehicle on his trip. Lastly, the defendant acknowledged that no one else had driven the vehicle within three days immediately prior to the traffic stop.

Following the hearing on the motion to suppress, the trial court denied the defendant's motion, concluding that the initial stop was based upon reasonable suspicion. The trial court further held that the initial search of the defendant's vehicle was based upon consent, and the more invasive search of the vehicle's rocker panels was based upon consent and also probable cause.

At trial, the State again presented the testimony of Officer Kohl. Though Officer Kohl's testimony was virtually identical to her testimony at the suppression hearing, she did relay some information that was not presented at the earlier hearing. For example, Kohl claimed that although she had conducted "several hundred" traffic stops

while working with the Drug Task Force, only approximately ten resulted in seizures of some kind of narcotics. Kohl also testified that when she witnessed the defendant's vehicle swerving within its own lane, in addition to being concerned that the driver was potentially intoxicated, she was also concerned that perhaps the driver "was getting tired and maybe he's going to fall asleep at the wheel." Officer Kohl also testified that because the windows of the vehicle being driven by the defendant were tinted, she did not actually view the defendant until she had stopped the vehicle and spoke to the defendant from the passenger side of the vehicle.

Kohl testified that the interior of the vehicle was littered with various items including a gallon jug of water, soda cans, empty juice containers, and half-eaten sandwiches. In contrast to the defendant's claim that he was occasionally stopping at rest areas, Officer Kohl said she saw no blankets or pillows in the vehicle's interior. Kohl stated that the condition of the interior of the vehicle, combined with the defendant's inconsistent responses to her questions concerning his destination, indicated to her that perhaps the defendant was transporting narcotics. Based upon this suspicion, she radioed for a drug-detection dog handler and prepared a "Consent to Search" form.

Kohl testified that when she asked the defendant if he was carrying weapons or illegal drugs, the defendant became nervous and offered to let her examine the vehicle's trunk. Kohl claimed that the defendant's invitation to look into the trunk only increased her suspicion, "[I]n the past when I found drugs that weren't in the trunk, people always want you to look in the trunk. And, to me, they're

trying to divert my attention away from where [the drugs] are [located]."

Conversely, at trial, the defendant testified, through an interpreter, that he did not state to Officer Kohl during the traffic stop that he did not know where he was going in Georgia. He also claimed that he did not tell Kohl that a cousin owned the vehicle that he was driving. Moreover, the defendant denied offering to let Kohl search the trunk. However, the defendant did testify that he consented in writing to the search with the full understanding that he could revoke his consent at any time.

At the conclusion of the trial, the jury found the defendant guilty of possession of one thousand grams or more of methamphetamine. The trial court sentenced the defendant to twenty years incarceration in the Tennessee Department of Correction.

On appeal, the Court of Criminal Appeals held that the initial traffic stop and Officer Kohl's continued detention of the defendant were not based upon reasonable suspicion and were in violation of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution. However, the Court of Criminal Appeals held that the defendant freely and voluntarily consented to the search and, because the consent was sufficiently attenuated from the unlawful traffic stop, the exclusionary rule did not bar introduction of the seized methamphetamine. Ultimately, the Court of Criminal Appeals reversed the defendant's conviction and remanded the case for a new trial based upon the improper testimony of a Houston, Texas, police officer during trial. Thereafter, we granted the defendant permission to

appeal on the following issue: whether the Court of Criminal Appeals erred by refusing to suppress evidence obtained as a result of the defendant's traffic stop.

For the reasons stated herein, we reverse that portion of the decision of the Court of Criminal Appeals finding the consent sufficiently attenuated from the illegal stop to render the search legal. Having thoroughly reviewed the record in this case and the applicable authorities, we hold that the initial stop and continued detention of the defendant in this case were not based upon reasonable suspicion of criminal activity and thus violated both the United States and Tennessee Constitutions. We also hold that the defendant's consent was not sufficiently attenuated from the unlawful stop; thus, the evidence seized in the defendant's traffic stop was fruit of the poisonous tree and should have been excluded. Accordingly, the defendant's conviction is reversed, and this case is remanded to the Criminal Court for Davidson County for proceedings consistent with this opinion.

STANDARD OF REVIEW

The instant case involves appellate review of a trial court's findings of fact and conclusions of law in denying a motion to suppress. The issue of whether reasonable suspicion existed to validate a traffic stop is a mixed question of fact and law. We review the factual determinations of a trial court under the standard articulated in *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). In *Odom*, we held that "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." *Id.* at 23. Additionally, "[q]uestions regarding witness credibility and 'resolution of conflicts in the

evidence are matters entrusted to the trial judge.'" *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001) (quoting *Odom*, 928 S.W.3d at 23).

In arguing that there was reasonable suspicion to validate the defendant's traffic stop in this case, the State argues that the Court of Criminal Appeals failed to give proper weight to the trial court's findings of fact by applying an erroneous standard of review. The State maintains that the Court of Criminal Appeals wrongly applied the standard of review to the findings of facts that we articulated in *State v. Binette*, 33S.W.3d 215, 217 (Tenn. 2000), rather than the proper *Odom* "preponderance" standard. In *Binette*, we applied a *de novo* standard of review with no presumption of correctness to the trial court's findings of fact because the only evidence presented on behalf of the State at the suppression hearing was a videotape of the defendant's alleged driving errors. *Id.* Our rationale for so holding was that "when a trial court's findings of fact on a motion to suppress are based *solely* on evidence that does not involve issues of credibility, appellate courts are just as capable to review the evidence and draw their own conclusions." *Id.* (emphasis added).

In contrast to *Binette*, in the instant case the State presented the testimony of Officer Kohl in addition to the videotape of the circumstances that led to his traffic stop. Moreover, in its order denying the defendant's motion to suppress, the trial court specifically accredited Officer Kohl's testimony. Nevertheless, the Court of Criminal Appeals reviewed the trial court's findings of fact *de novo* claiming that "in [the trial court's] order denying the [defend]ant's motion to suppress, the trial court ultimately cites its own observations of the videotape recording in support of its determination of reasonable suspicion."

Because the testimony of Officer Kohl involves issues of credibility, we will review the trial court's findings of fact under the *Odom* standard. In reviewing these findings of fact, we note that the testimony presented at trial may also "be considered by an appellate court in deciding the propriety of the trial court's ruling on the motion to suppress." *Walton*, 41 S.W.3d at 81 (quoting *State v. Perry*, 13 S.W.3d 724, 737 (Tenn. Crim. App. 1997)); *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998).

However, while we afford some deference to the trial court's findings of fact, the application of the law to those facts is a question of law which this Court reviews *de novo* with no presumption of correctness. *State v. Yeargen*, 958 S.W.2d 626, 629 (Tenn. 1997) (citing *Beare Co. v. Tennessee Dep't of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993)).

ANALYSIS

REASONABLE SUSPICION

The Fourth Amendment to the United States Constitution guarantees that "the right of the people to be secure . . . against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause."[3] Likewise, Article I, section 7 of the Tennessee Constitution guarantees "that the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures. . . ." We have often noted that Article I, section 7 of our state constitution "is

[3] The Fourth Amendment to the United States Constitution is applicable to the states via the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

identical in intent and purpose with the Fourth Amendment." *Binette*, 33 S.W.3d at 218 (citing *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968)). Thus, the language of both the federal and state constitutions mandate that "a warrantless search or seizure is presumed unreasonable, and the evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *Yeargan*, 958 S.W.2d at 629; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Though a warrant is normally required when a police officer intrudes upon the privacy of a citizen, *see INS v. Del Gado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 1762 (1984), there are exceptions to the warrant requirement. One exception exists "when a police officer makes an investigatory stop based upon reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed." *Binette*, 33 S.W.3d at 218 (citing *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). We have noted that "[u]pon turning on the blue lights of a vehicle, a police officer has clearly initiated a stop and has seized the subject of the stop within the meaning of the Fourth Amendment of the Federal Constitution and Article I, section 7 of the Tennessee Constitution." *Id.* (citing *State v. Pulley*, 863 S.w.2d 29, 30 (Tenn. 1993)). Accordingly, in the instant case, when Officer Kohl stopped Garcia's vehicle by turning on her blue lights, she must have had reasonable suspicion, supported by specific and articulable facts, that the defendant had committed, or was about to commit, a criminal offense in order for the stop to be constitutionally valid.

Determining whether reasonable suspicion existed in a particular traffic stop is a fact-intensive and objective analysis. The United State Supreme Court has stated that "[i]n determining whether a police officer's reasonable suspicion is supported by specific and articulable facts, a court must consider the totality of the circumstances." *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) (citing *United State v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)); *see also State v. Bridges*, 963 S.W.2d 487, 492 (Tenn. 1997).

In the instant case, the defendant, citing this Court's decision in *Binette*, argues that there was no reasonable suspicion to validate the initial traffic stop. In *Binette*, the defendant was convicted for DUI after being stopped by a Chattanooga, Tennessee, police officer. The officer had followed Binette for several minutes and videotaped the defendant's driving before stopping him. During the videotape, the officer made several comments about driving errors he claimed were being made by Binette, including speeding, crossing the yellow line, and swerving within his own lane all the way to the center line. Upon a *de novo* review, this Court reversed the defendant's conviction holding that "[w]hile Binette did move laterally at times within his lane while operating his vehicle, we find that his movement was not pronounced, and therefore did not give rise to reasonable suspicion." *Binette*, 33 S.W.2d at 220.

Conversely, the State argues in this case that the following specific and articulable facts gave rise to a reasonable suspicion that the defendant was either intoxicated while operating his vehicle or falling asleep shortly before being stopped by Officer Kohl: 1) the defendant was weaving back and forth within his own lane in a continual

manner in Davidson County; and 2) there was considerable high-speed traffic, some of which can be seen braking when approaching Garcia's vehicle and trying to pass.

We have viewed the videotape and reviewed the testimony of Officer Kohl pertaining to the defendant's driving shortly before the traffic stop. Much like *Binette*, we find no evidence "of pronounced weaving or hard swerving" by Garcia. *Binette*, 33 S.W.3d at 219. In fact, despite the testimony of Officer Kohl, we are unable to detect any weaving upon viewing the videotape.[4] We also note that both the majority and dissenting opinions of the Court of Criminal Appeals in this case concluded that the defendant remained within his lane at all times and did not exhibit any weaving that was either exaggerated or pronounced. However, "[t]he number of times that a vehicle touches a center line or drifts within a lane is not dispositive" of whether reasonable suspicion existed to validate a traffic stop. *Id.* "Rather, as we have previously noted, a court must consider the totality of the circumstances in determining whether reasonable suspicion was present at the time a stop was initiated." *Id.*

Prior to Officer Kohl's stop of the defendant, the videotape reveals that Garcia was traveling at what appears to be a safe rate of speed in the far right lane of an interstate highway. The videotape also reveals that Garcia slowly moved his vehicle slightly within his lane of

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[4] With due respect to the author of the dissenting opinion, we did not find the videotape to be "dark, indistinct, and mainly consist[ing] of diffused light." Conversely, we were able to see clearly what was depicted with respect to the defendant's driving, other traffic, and the condition of the roadway.

travel approximately twice over a period of approximately two minutes. At no point does the vehicle exhibit any sharp or jerking movements. While there is a short period of time when the vehicle is not visible on the videotape, we find no testimony in the record suggesting that the defendant exhibited any pronounced or exaggerated swerving during that brief time period. Moreover, we place little weight on the fact that there was considerable traffic on the interstate on the night of the defendant's traffic stop. The videotape reveals that several cars approached the defendant from the rear and easily passed his vehicle by moving to the next lane. Additionally, the State does not contest that the defendant was driving in compliance with Tennessee Code Annotated section 55-8-123(1) (1998), which states:

> Whenever any roadway has been divided into two (2) or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made safely. . . .

At the suppression hearing, the State introduced section 12.68.170 of the Metropolitan Nashville Code which proscribes driving carelessly "so as . . . to endanger the life, limb, or property of any person." Given that Officer Kohl testified that she did not witness the defendant speed, drive too slowly, cross any lanes of traffic, illegally pass another vehicle, follow too closely, commit a violation regarding use of the turning signal, or drive on the shoulder, we agree with the lower court that neither the videotape nor Officer Kohl's testimony reflect that, at the time

he was pulled over, the defendant was currently endangering "the life, limb, or property of any person."

In short, in accordance with the *Odom* standard, we conclude that the trial court's findings of fact at the suppression hearing are not supported by the preponderance of the evidence. Accordingly, we hold that as a matter of law there was no reasonable suspicion to stop Garcia. While the defendant's driving may not have been perfect, we saw no evidence of weaving on the videotape, and we reiterate that "it is the rare motorist indeed who can travel for several miles without occasionally varying speed unnecessarily, moving laterally from time to time in the motorist's own lane, nearing the center line or shoulder, or exhibiting some small imperfection in his or her driving." *Binette*, 33 S.W.3d at 219 (quoting *State v. Binette*, 1999 WL 427606 at *2 (Tenn. Crim. App. 1999) (Smith, J., dissenting)).

ATTENUATION

Having determined that there was no reasonable suspicion to stop the defendant, the next inquiry is whether the evidence discovered during the illegal stop must be suppressed. Although the Court of Criminal Appeals held that the evidence was obtained during an unlawful stop of the defendant, it nevertheless held that the exclusionary rule would not bar introduction of the discovered methamphetamine because Garcia's consent to search the vehicle was sufficiently attenuated from the unlawful seizure. We disagree.

The history and purpose of the exclusionary rule have been well chronicled. In *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407 (1963), the Supreme Court

acknowledged that it acts as a prophylactic guard to bar the admissibility of evidence obtained in violation of an individual's Fourth Amendment rights. However, the Court refused to hold that all evidence obtained as a result of police misconduct would be considered "'fruit of the poisonous tree' simply because [the evidence] would not have come to light but for the illegal actions of the police." *Id.* at 487-88.

We note at the outset that "a consent to search that is preceded by an illegal seizure is not 'fruit of the poisonous tree' if the consent is both: 1) voluntary, and 2) not an exploitation of the prior illegality." *See* Wayne LaFave, 3 *Search and Seizure* § 8.2(d) at 656 (3d ed. 1996). In this case, the defendant does not argue that his consent was involuntary. He clearly acknowledged at trial that he voluntarily signed the consent to search form prepared by Officer Kohl, fully understanding that he could revoke his consent at any time. Thus, the issue before us is whether the defendant's consent was an exploitation of the prior unlawful seizure.[5]

We have previously noted that attenuation issues are highly factual. *See State v. Huddleston*, 924 S.W.2d 666, 674 (Tenn. 1996). In making our evaluation, we look to the factors articulated by the Supreme Court in *Brown v. Illinois*, 442 U.S. 590, 603-04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). Though the *Brown* factors were designed to aid

[5] Both sides have argued that the other party has waived the attenuation issue by failing to raise it at the trial level. However, because the issue of attenuation did not arise until the Court of Criminal Appeals determined the traffic stop to be unlawful, we will address the issue on the merits.

courts in determining whether a confession was obtained by exploitation of an illegal arrest, these factors may also be used by courts to evaluate whether the causal connection between an unlawful seizure and a subsequent consent has been broken, i.e. whether the primary taint of an unlawful seizure has been sufficiently attenuated from the voluntary consent. The *Brown* factors are as follows: 1) the temporal proximity of the illegal seizure and consent; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct. *Id.*[6] Additionally, we note that the burden of showing attenuation lies with the State. *See Brown*, 422 U.S. at 604.

The first *Brown* factor for our consideration is the temporal proximity of the illegal seizure and consent. Various courts addressing this factor have noted that "[a] brief time lapse between a Fourth Amendment violation and consent often indicates exploitation [of the prior illegal police action] because the effects of the misconduct have not had time to dissipate." *State v. Hansen*, 63 P.2d 650, 666 (Utah 2002) (citing *State v. Shoulderblade*, 905 P.2d 289, 293 (Utah 1995)); *see also United States v. Melendez-Garcia*, 28 F.3d 1046, 1055 (10th Cir. 1994); *State v. Williams*, 571 S.E.2d 703, 711 (S.C. Ct. App. 2002) (finding no attenuation where only a minimal time passed between illegality and consent). Here, the lapse of time between the illegal detention and consent was negligible.

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[6] Though the application of the attenuation doctrine to a consent following an illegal seizure is an issue of first impression for this Court, we have previously adopted the *Brown* attenuation factors to evaluate whether a confession was admissible following a Fourth Amendment violation. *Huddleston*, 924 S.W.2d at 674.

The illegal detention began when Officer Kohl turned on the blue lights during the traffic stop and did not end until she told Garcia that the stop was complete. Immediately thereafter, Kohl began asking the defendant more questions and had obtained his voluntary written consent within a scant few minutes. Hence, no appreciable time passed between the defendant's unlawful detention and the consent that would have allowed the taint of the misconduct to dissipate. Thus, this factor weighs against a finding of attenuation.

Next, we consider whether the presence of intervening circumstances support a finding of attenuation. The State argues that Officer Kohl's unequivocal statement to the defendant that he was free to go was an intervening circumstance which purged the taint of the prior illegality. Several courts have held that communication to a driver that he or she is free to go prior to requesting consent serves to attenuate the consent from the illegal traffic stop. *See, e.g.*, *State v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994); *United States v. Fernandez*, 18 F.3d 874, 882 (10th Cir. 1994); *United States v. Ramstad*, 120 F.Supp.2d 973, 980 (D. Kan. 2000). While we agree with those courts that such an action by a police officer does act as an intervening circumstance weighing in favor of attenuation, we are also mindful that a citizen who has been subjected to a traffic stop is not likely to walk away from continued police questioning, despite being told that he or she is free to leave. *See Commonwealth v. Strickler*, 757 A.2d 884, 898 (Pa. 2000) (noting that the "element of coercion is obviously enhanced when police actually detain a citizen . . . by means of a traffic stop"). In this case, the defendant's willingness to answer more of Officer Kohl's questions could have been influenced by the fact that another police

car with flashing blue lights had arrived on the scene during the traffic stop.

Several commentators, including Harvard Law Professor William J. Stuntz have opined that "ordinary people never feel free to terminate a conversation with a police officer." William J. Stuntz, *Terry's Impossibility*, 72 St. John's L. Rev. 1213, 1215 (1998). The Supreme Court of Virginia recently echoed this concern in a case similar to the instant case when it held that a motorist who was told by an officer that he was "free to leave" but immediately was asked questions concerning whether he had any weapons or drugs was re-seized upon continued questioning. *Reittinger v. Commonwealth*, 532 S.E.2d 25, 28 (Va. 2000). Thus, while we acknowledge the fact that Garcia was told he was free to go, we give this factor little weight given the immediacy with which Officer Kohl began questioning the defendant after telling him he was free to leave and the presence of the other police cruiser.

Finally, we consider the purpose and flagrancy of the official misconduct. The final *Brown* factor we consider particularly important because it is most closely tied to the rationale of the exclusionary rule – to discourage police misconduct. *See Brown*, 422 U.S. at 604; *Huddleston*, 924 S.W.2d at 676; *State v. Richter*, 612 N.W.2d 29, 41 (Wis. 2000). In this case, there was no reasonable suspicion to stop the defendant. However, assuming *arguendo* that Officer Kohl had reasonable suspicion to suspect that the defendant was intoxicated, by her own account, Kohl knew two minutes into the stop that the defendant was not intoxicated. Yet, she retained his driver's license and vehicle registration, wrote out a warning ticket even though no crime had been committed by the defendant, prepared a consent to search form in Spanish, and radioed

for a drug-detection dog. All these actions were taken despite there being no reasonable suspicion that the defendant was engaged in criminal activity. Kohl's status as a member of the drug task force adds to the likelihood that her prolonged and unreasonable detention of the defendant was for the sole purpose of obtaining consent to search his vehicle. Under such circumstances, we conclude that the defendant's consent was gained in exploitation of the unlawful detention.

In his dissenting opinion in the court below, Judge John Everett Williams emphasized that the extended detention of the defendant revealed that the defendant's consent was obtained by exploitation of the prior illegality:

> [T]he issuance of the warning ticket resulted in the continuation of an unlawful detention, and appears to have been pre-text to allow the officer the opportunity to prepare a consent form in Spanish. The warning ticket took some ten to twelve minutes to issue . . . .
>
> My review of the record and video tape (sic) revealed a perfectly choreographed performance by the officer subjectively calculated to and objectively resulting in exploitation of the illegal stop and detention of the defendant in order to obtain his consent to search. Assuming arguendo that the purpose of the illegal stop was not to obtain consent to search the vehicle, the continued detention of the defendant under the guise of issuing a warning ticket was clearly in pursuance of a conscious objective to obtain consent to search.

State v. Garcia, No. M2000-01760-CCA-R3-CD, at 2-3 (Tenn. Crim. App. May 15, 2001) (filed at Nashville) (Williams, J., dissenting).

After a thorough review of the record, we agree with Judge Williams that Officer Kohl's attempt to gain the defendant's consent to search the vehicle was done through exploitation of the illegal detention of the defendant. Officer Kohl's (unreasonable) suspicion that the defendant was intoxicated was quelled two minutes into the traffic stop. As a result, she had no reasonable basis to detain the defendant. Likewise, because the defendant had broken no traffic law, we question under what authority she issued the warning ticket. Thus, we conclude that this factor weighs against a finding of attenuation.

Accordingly, after due consideration of the *Brown* attenuation factors, we conclude that the State has failed to carry its burden of demonstrating that the consent was sufficiently attenuated from the unlawful detention. Thus, we are constrained to hold that the methamphetamine, obtained during an unlawful detention of the defendant, should have been suppressed.

CONCLUSION

In sum, we hold that the traffic stop of the defendant in this case was not based upon reasonable suspicion in violation of the Fourth Amendment and Article I, section 7. We also hold that although the defendant's consent to search his vehicle was given voluntarily, the evidence seized must be suppressed because the consent was not sufficiently attenuated from the unlawful detention. Accordingly, the defendant's conviction is reversed, and the cause is remanded to the Criminal Court for Davidson County for proceedings consistent with this opinion.

Costs of this appeal are taxed to the State of Tennessee, for which execution may issue if necessary.

/s/ William M.Barker
WILLIAM M. BARKER, JUSTICE

JANICE M. HOLDER, J., dissenting.

The standard for reviewing a trial court's findings of fact in a suppression hearing is governed by our opinion in *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). In *Odom*, we held that a trial court's findings of fact will be upheld unless the evidence preponderates otherwise. *See* 928 S.W.2d at 23. The majority purports to apply this standard in reviewing the trial court's conclusion that Officer Kohl's investigatory stop was based on reasonable suspicion. However, the majority opinion's reasonable suspicion analysis suggests differently.

Instead of giving deference to the trial court's findings as *Odom* requires, the majority independently viewed the videotape, reviewed the transcript of the testimony of Officer Kohl, and then substituted its own findings for those of the trial court. In so doing, the majority appears to be applying the de novo standard that was established in *State v. Binette*, 33 S.W.3d 215 (Tenn. 2000), and applied in this case by the Court of Criminal Appeals. While disavowing the Court of Criminal Appeals' use of this standard, the majority proceeds to subtly question the trial court's findings and ultimately concludes that Officer Kohl did not have reasonable suspicion to stop Garcia as a matter of law.

In *Binette*, the majority relied upon the "deposition rule" articulated in workers' compensation cases and adopted a new de novo standard to review evidence that the majority believed was limited to videotaped evidence. *See* 33 S.W.3d at 217. The rationale behind the holding in *Binette* was that appellate courts are just as capable as trial courts to review such evidence and draw their own conclusions when no issues of credibility exist. *See id.* I disagreed with this rationale and with the standard adopted in *Binette*. *See id.* at 220-22 (Holder, J. dissenting). I disagree with applying such a standard to what is clearly a combination of live-witness and videotape evidence.

Applying a standard other than that which this Court espoused in *Odom* is not only unnecessary, it is dangerous. As *Binette* and the present case show, a standard of review that fails to afford a presumption of correctness to the trial court allows the majority's interpretation of the events to ultimately trump the police officer's recollection of those events and the trial court's findings of fact. In my opinion, the videotape hardly presents a crystal clear view of the events captured. The picture is dark, indistinct, and mainly consists of diffused light. The images on the screen are further obscured by shadows created by the overhead streetlights. As such, I question how well the videotape depicts what Officer Kohl actually saw. Moreover, I continue to adhere to my opinion that trial courts are in a better position than appellate courts to make findings of fact, irrespective of the form of the evidence, and that the standard applied by the majority in this case essentially establishes a "last in line is right" rule. By substituting its own interpretation of the events for the trial court's findings, the majority exceeded its proper role.

I would hold that an application of the *Odom* standard establishes that the officer in this case had reasonable suspicion to stop Garcia. Reasonable suspicion is determined by considering the totality of the circumstances surrounding the stop. *See Binette*, 33 S.W.3d at 218; *see also State v. Bridges*, 963 S.W.2d 487, 492 (Tenn. 1997). In the present case, Officer Kohl stopped Garcia on Interstate 24 at approximately 11:00 p.m. Officer Kohl testified at the suppression hearing that she observed Garcia weave multiple times before she decided to stop him. The trial court found Officer Kohl's testimony credible and found that the videotape supported her testimony. The trial court also stated that the videotape showed Garcia "noticeably swerve[]" on at least three occasions. In addition, at trial, Officer Kohl testified that she noticed that Garcia was swerving "in a continual manner." I would conclude that the evidence does not preponderate against the trial court's findings. In *Binette*, the defendant had to negotiate intersections, stop lights, and winding roads. Garcia, on the other hand, was driving on a straight interstate. Moreover, considerable traffic was on the interstate around Garcia, which "amplified the situation" according to the trial court. Binette was on a road with very little traffic. Viewed under a totality of the circumstances standard, I would hold that the noticeable and continual weaving in this case constituted reasonable suspicion to stop Garcia under *Binette*.

Furthermore, I would hold that Officer Kohl's investigative detention of Garcia was reasonable. Traffic stops are investigative stops. *See State v. Troxell*, 78 S.W.3d 866, 871 (Tenn. 2002). Consequently, a police officer's actions in conducting such a stop cannot exceed the scope of the circumstances that justified the stop. *Id.* A reasonable

traffic stop can become unreasonable if the " 'time, manner or scope of the investigation exceeds the proper parameters' " *Id.* (quoting *United States v. Childs*, 256 F.3d 559, 564 (7th Cir. 2001)).

In assessing whether a detention is excessive in length, a court must determine if "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *State v. Simpson*, 968 S.W.2d 776, 783 (Tenn. 1998). In this case, less than fifteen minutes elapsed from the time Officer Kohl stopped Garcia to the time she handed Garcia his driver's license, the vehicle registration, and the warning citation and told him that the stop was complete. Accordingly, the length of the investigation was not excessive. *See Weaver v. Shadoan*, 340 F.3d 398, 408-09 (6th Cir. 2003) (concluding that a ten to fifteen minute detention was not unlawful); *United States v. Wellman*, 185 F.3d 651, 656-57 (6th Cir. 1999) (indicating that a fifteen to twenty minute detention was not unlawful).

A detention also may be unreasonable if the investigation's scope exceeds the purpose of the traffic stop. Once the purpose of the initial stop is accomplished, an officer may not detain the motorist further unless the stop yields the necessary reasonable suspicion to justify extending the detention. *State v. England*, 19 S.W.3d 762, 767 (Tenn. 2000). "[I]nconsistencies in information given to an officer during a traffic stop may give rise to reasonable suspicion of criminal activity." *United States v. Smith*, 263 F.3d 571, 592 (6th Cir. 2001). Officer Kohl's questions concerning Garcia's destination followed logically from her earlier inquiries regarding his state of intoxication or fatigue and did not exceed the scope of the stop. However, once Officer Kohl determined that Garcia was tired but not intoxicated,

the investigation should have ended unless the officer had reasonable suspicion to justify extending the stop. Officer Kohl testified that she was satisfied that Garcia was not intoxicated after they discussed his destination and he handed over his driver's license. Nevertheless, Garcia's evasiveness regarding his destination along with his implausible statement that he had left Los Angeles the previous day gave Officer Kohl reasonable suspicion to continue her investigation into the ownership of the vehicle. Garcia's inconsistent answers to Officer Kohl's subsequent questions along with his travel plans and the litter that was strewn throughout the inside of the vehicle provided Officer Kohl with reasonable suspicion to extend the detention further. Based on these circumstances, I would hold that Officer Kohl's investigative detention of Garcia was reasonable.

Because I would conclude that the initial stop and continued detention of Garcia were based upon reasonable suspicion, I disagree with the majority's holding that Garcia's constitutional rights were violated and that Garcia's consent to search was an exploitation of a prior unlawful seizure. Therefore, I must respectfully dissent.

/s/ Janice M. Holder
JANICE M. HOLDER, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
May 28, 2003 Session Heard at Cookeville

STATE OF TENNESSEE v.
GONZALO MORAN GARCIA

Criminal Court for Davidson County
No. 99-C-2220

No. M2000-01760-SC-R11-CD

(Filed Oct. 1, 2003)

JUDGMENT

This case was heard upon the record on appeal from the Court of Criminal Appeals, application for permission to appeal having been granted, briefs and argument of counsel; and upon consideration thereof, this Court is of the opinion that the defendant's traffic stop was not based upon reasonable suspicion, in violation of the Fourth Amendment to the Federal Constitution and Article I, section 7 of the Tennessee Constitution. This Court is also of the opinion that the evidence in this case must be suppressed because the defendant's consent to search his vehicle was not sufficiently attenuated from his unlawful detention.

In accordance with the opinion filed herein, it is, therefore, ordered and adjudged that the judgment of the Court of Criminal Appeals is Affirmed in Part and Reversed in Part and the defendant's conviction and sentence are vacated. This case is remanded to the Criminal Court for Davidson County for proceedings consistent with the opinion of this Court.

Costs of this appeal are taxed to the State of Tennessee, for which execution may issue if necessary.

IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE AT NASHVILLE
May 15, 2001 Session

STATE OF TENNESSEE v.
GONZALO MORAN GARCIA

Direct Appeal from the Criminal Court
for Davidson County
No. 99-C-2220 Steve Dozier, Judge

No. M2000-01760-CCA-R3-CD

(Filed Feb. 20, 2002)

The appellant, Gonzalo Moran Garcia, appeals his conviction by a jury in the Davidson County Criminal Court of one count of possession of one thousand grams or more of methamphetamine with intent to deliver, a class A felony. He raises the following issues for our review: (1) whether the trial court erred in denying his pre-trial motion to suppress; (2) whether the trial court erred in admitting at trial the testimony of Daniel A. Rosales, an officer employed by the Houston Police Department in Texas; (3) whether the evidence underlying the appellant's conviction is sufficient; and (4) whether the trial court erred in rejecting his proposed jury instructions. Following a thorough review of the record and the parties' briefs, we reverse the judgment of the trial court and remand this case to the trial court for a new trial.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Criminal Court is Reversed and Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH J., joined. JOHN EVERETT WILLIAMS, J; filed a dissenting opinion.

Richard McGee, James Holt Walker, and Bobby Ballinger, Nashville, Tennessee, for the appellant, Gonzalo Moran Garcia.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and John Zimmerman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On September 24, 1999, a Davidson County Grand Jury returned an indictment charging the appellant with one count of possession of one thousand grams or more of methamphetamine with intent to deliver. The indictment arose from the traffic stop on May 9, 1999, of the vehicle that the appellant was driving on Interstate Highway 24 in Davidson County and the subsequent seizure by police of approximately 40.1 pounds, or more than eighteen thousand grams, of methamphetamine. Following his indictment, the appellant filed a motion to suppress any evidence obtained during or as a result of the traffic stop. The trial court conducted a hearing on the appellant's motion on December 10, 1999.

A. Suppression Hearing

At the suppression hearing, the State presented the testimony of Debra Kohl,[1] an officer with the Metropolitan

[1] Officer Kohl's first name is spelled "Deborah" in the trial transcript.

Nashville Police Department. She testified that she had been employed by the police department for eleven years and was currently assigned to the Highway Interdiction Unit of the Twentieth Judicial District Drug Task Force. Prior to working with the Highway Interdiction Unit, she was a patrol officer for several years, which position required training in the investigation and apprehension of drunk drivers. She joined the Highway Interdiction Unit eight months prior to the traffic stop in this case and, due to her new assignment, attended two conferences on illegal drug interdiction that were organized by the United States Customs Service and the Drug Enforcement Administration (hereinafter the DEA). Additionally, she worked with the United States Customs Service in El Paso, Texas, for one week. Finally, she attended additional training conferences in Nashville and Memphis on illegal drug interdiction.

Kohl related that, on May 9, 1999, at approximately 10:50 p.m., she was traveling on Interstate Highways 40 and 24 in a marked patrol car when she noticed the appellant's vehicle traveling in the right lane. Her attention was drawn to the appellant's vehicle because it swerved onto the line demarcating the right boundary of its lane. Kohl slowed her patrol car and began to monitor the appellant's vehicle.

As the appellant's vehicle proceeded on Interstate Highway 24 toward Chattanooga, it continued to weave within its lane. Kohl opined that the driver of the vehicle was driving carelessly, recalling:

> The vehicle would drive in its lane – it stayed in its lane of traffic; but, as the vehicle was going in its lane of traffic, it would go to the left-lane

> marker, then it would swerve over to the right-lane marker, then it would swerve over to the left-lane marker.
>
> And I became concerned for his safety, as well as the safety of other motorists, and decided to stop the vehicle, at that point in time.

Kohl testified that she suspected, among other possibilities, that the driver of the vehicle was intoxicated.

After stopping the appellant's vehicle, Kohl approached the passenger's side on foot. Peering through the front, passenger's side window, she motioned for the driver to open the window. When the appellant complied, Kohl identified herself and asked the appellant to join her at the rear of his vehicle. The appellant, however, did not respond, and Kohl inquired in English whether he spoke Spanish. The appellant responded affirmatively, whereupon Kohl instructed him in Spanish to get out of his car and come to the rear of his vehicle. Kohl asserted at the suppression hearing that she speaks Spanish with sufficient fluency to "get through a traffic stop."

The appellant followed the officer's instructions, and Kohl informed him in Spanish that she was an officer with the Metropolitan Nashville Police Department and had stopped his vehicle because he was weaving within his lane. The appellant repeated in English, "I was weaving." Accordingly, Kohl continued the conversation in English. She recalled at the suppression hearing that the appellant was appropriately responsive to all her inquiries in English.

Although at this point during the traffic stop Kohl had not observed any signs that the appellant was intoxicated, she was not yet satisfied that he was free of any impairment. Accordingly, she inquired whether the appellant had

been drinking alcohol and, upon his denial, inquired if he was tired. The appellant conceded that he was tired, admitting that he had been driving since he left Los Angeles, California, on the previous day, pausing only briefly at a "few rest stops" to sleep. Kohl asked the appellant about his destination, and he indicated that he was traveling to Georgia. Kohl recalled:

> And I said, "Where in Georgia?".
> He said he didn't know.
> I said, "Well, how are you supposed to know where you supposed to go in Georgia?".
> And he said, when he got close to the – to the area, he had a pager number he was supposed to call.
> I asked him who the pager number belonged to.
> And he said it was his cousin, Miguel's.
> I asked if he knew where Miguel lived.
> And he said, "No."
> Then I asked him where he was going to stay at.
> And he said he didn't know where he was going to stay; he thought a hotel, maybe.
> Then I asked him if the vehicle was his vehicle.
> And he said, no, that it belonged to his cousin.
> I asked him what his cousin's name was.
> And he told me, "Well, he's not really my cousin."
> So, then I said, "Well, who is he?".
> "He's my friend."
> So, I said, "Well, is he your cousin or is he your friend?".
> He – "Well" – he said, "Well, he's a friend who's like a cousin."
> I said, "Okay. What's your cousin's name?".
> And he gave me a name.
> And I said, "Well, that's nice of him to let you borrow the car on this trip."
> He said, Well, he's not really my friend."
> I said, "Well, then who is he?".

> He said, "He's a friend of my friend at work."
> . . . .
> I said, "Well, what kind of work do you do?".
> And he said that he did hardwood-floor work.
> At that point in time, I asked him if he had the registration, and he went to the glove box and retrieved the registration for me.

Kohl further indicated at the suppression hearing that she requested the appellant's driver's license after inquiring concerning the length of the appellant's journey and prior to inquiring concerning the ownership of the vehicle in which the appellant was driving. Upon observing the appellant retrieve his driver's license from his wallet, Kohl was satisfied that the appellant was not intoxicated. As to her subsequent acquisition of the vehicle registration document, Kohl was unable to recall at the suppression hearing whether the name recorded on the document was the same as the name provided by the appellant and identified by him as belonging to the vehicle's owner. Kohl testified that she did, however, confirm that the registration matched the vehicle's license plate. Moreover, after obtaining both the appellant's driver's license and his vehicle registration document, she asked the appellant about his driving record and his arrest record. With respect to the latter, the appellant informed Kohl that he had once been arrested for driving under the influence.

Having examined the appellant's driver's licence and vehicle registration document, Kohl explained to the appellant that she was going to issue him a warning citation. Additionally, upon inquiry by the appellant, she provided him with directions to a location at which he could park his car and sleep. Finally, she instructed the

appellant to wait inside his car while she completed the necessary paperwork.

Retaining the appellant's driver's license and vehicle registration document, Kohl returned to her patrol car. Inside the patrol car, she radioed a fellow officer, Dean Hunter, and asked that he transport a drug-detection dog to the scene of the traffic stop. She then filled out a warning citation for violation of "lane restrictions." She also prepared a "Consent to Search" form written in Spanish before returning to the appellant's vehicle.

Upon approaching the appellant once again, Kohl instructed him to get out of his vehicle and, upon his compliance, returned to him his driver's license and vehicle registration document. She also gave to him the warning citation, thanked him, and informed him, "The stop's complete." The appellant began walking back to his vehicle, and she turned to begin walking toward her patrol car. She paused, however, and asked the appellant if she could ask him several questions. The appellant returned to her location, and she asked him if he had any weapons in his vehicle. He responded, "No." She then asked him if he had any illegal drugs in the vehicle. Kohl recalled:

> At that point in time, his demeanor changed. He gave me a – a nervous, laughing, "No." And he – he became fidgety. You could see him scratching on his back. He was nervous, and you could literally see his Adam (sic) apple, a nervous sign, bobbing up and down, which I was talking to him, which, to me, is an indicator of some type of deception.

Following the above exchange, Kohl asked the appellant if she could search his vehicle. He quickly offered to

open his trunk for her inspection, but Kohl declined the appellant's offer and instead asked him if he was able to read in Spanish. Upon receiving an affirmative reply, she asked him to read the Spanish "Consent to Search" form that she had prepared. Kohl testified, "[A]s he read, you could follow his finger going along each sentence, which, to – me, demonstrated that he was actually reading the statement." The consent form contained advice concerning the appellant's right to refuse consent to a search of his vehicle, his right to limit any consent to certain areas of his vehicle, and his right to revoke his consent at any time. Nevertheless, the appellant signed the consent form, agreeing to a search of his vehicle without imposing any limitations.

Meanwhile, Officer Dean Hunter had arrived at the scene of the traffic stop with a drug-detection dog. Following the appellant's consent to a search of his vehicle, Hunter permitted the dog to sniff the vehicle. The dog signaled the presence of drugs in both the driver's side and the passenger's side of the vehicle. Accordingly, Hunter, Kohl, and a third officer began a search of the vehicle.

During the search, Hunter noticed that the vehicle's rocker panels[2] had been freshly painted. He therefore procured a drill and used the tool to remove the screws "that hold the rubber or plastic molding over the top of [one of] the rocker panels." Upon removing the "rubber or plastic molding," Hunter inserted a small metal probe into

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[2] A rocker panel is "the portion of the body paneling of a vehicle that is situated below the doorsills of the passenger compartment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1965 (1993).

pre-existing screw holes, meeting with some resistance. He then drilled into the pre-existing holes "[a]nd . . . started coming up with some terry – white-terry-cloth material, like a bath-towel material." At this point, Kohl retrieved a "buster" or density meter from her patrol car and measured the density of the rocker panels, receiving unusually high measurements. Due to the high measurements, the officers drilled new holes in the rocker panels. In addition to the terry cloth material, "a pinkish-brown-type material . . . came out on the drill bit." Kohl recounted that they tested the substance for the presence of cocaine but received negative results. Nevertheless, "we knew something was there that didn't belong there." Finally, the officers broke the rocker panels, revealing "duct-taped bundles." Kohl arrested the appellant, and subsequent testing established that the bundles contained approximately twenty kilograms of methamphetamine.

The State also introduced into evidence at the suppression hearing a videotape of Kohl's traffic stop of the appellant. The videotape does not contain an audio component. Kohl explained that, following the traffic stop, she discovered that the battery powering the audio equipment was dead.

In addition to Kohl's testimony and the videotape of Kohl's traffic stop of the appellant, the State presented the testimony of Officer Dean Hunter of the Metropolitan Nashville Police Department.[3] Hunter related that he had been a police officer for approximately twenty years and

[3] Officer Hunter is identified as "Wilford Rodene Hunter" in the trial transcript.

had been a "canine officer" for approximately thirteen years. According to Hunter, he had been assigned two different drug-detection dogs during the course of his career as a canine handler; moreover, he was certified by the United States Police Canine Association (hereinafter UPCA) as a trainer of drug-detection dogs. Hunter testified that he was currently assigned a drug-detection dog named Lou. Prior to the traffic stop in this case and in accordance with the standards of the UPCA, Lou had successfully completed a ten-week training course in drug detection. Additionally, Lou underwent continuing training a minimum of eight hours each week.

Hunter further testified that he was currently assigned to the Highway Interdiction Unit of the Twentieth Judicial District Drug Task Force and, on May 9, 1999, was patrolling the interstates with Lou. Hunter confirmed that he and Lou assisted Kohl during the traffic stop of the appellant's vehicle and that Lou alerted the officers to the presence of illegal drugs in the vehicle four times, three times on the driver's side of the vehicle and once on the passenger's side. During the ensuing search of the appellant's vehicle, Hunter noticed that the vehicle's rocker panels had been freshly painted. He explained at the suppression hearing that he noticed the freshly painted rocker panels due to his past employment in an automobile body repair shop. Hunter carefully examined the entire vehicle and did not see any other areas where the vehicle had been re-painted.

As a result of Hunter's discovery, the officers removed the plastic molding covering one of the rocker panels, and Hunter inserted a metal probe into pre-existing holes. Hunter recalled, "I was meeting resistance; and, when I'd take the probe, because it was a sharp object on the end,

and push [further] . . . , I could go through the resistance and I could go to the bottom of the rocker panel." Hunter noted that a rocker panel is normally hollow. Accordingly, he concluded that "something was in the rocker panel, that wasn't necessarily supposed to be there." Further investigation revealed packages concealed inside the rocker panel.

Finally, the State introduced into evidence without objection a certified copy of Metropolitan Nashville Code § 12.68.170, entitled "Careless driving." *See* Tenn. R. Evid. 202(b). The ordinance provides:

> A. Every person operating a vehicle upon the streets within the metropolitan government, or upon any private road or driveway or parking area, shall drive the same in a careful and prudent manner, having regard for the width, grade, curves, corners, traffic and use of these streets and private areas, and all other attendant circumstances, so as not to endanger the life, limb or property of any person. Failure to drive in such manner shall constitute careless driving and a violation of this chapter.

By means of an interpreter, the appellant testified at the suppression hearing for the sole purpose of establishing his standing to contest the search of the vehicle in which he was driving on the night of the traffic stop. He asserted that the owner of the vehicle had given him permission to use the vehicle, providing him with the keys. The appellant explained that the owner was willing to loan him the vehicle because the owner was on vacation in Mexico. According to the appellant, the owner was aware of the appellant's planned trip to Georgia. The appellant concluded that, prior to the traffic stop at issue in this

case, he had been in exclusive possession of the vehicle for three days.

Following the suppression hearing, on February 8, 2000, the trial court denied the appellant's motion to suppress. As relevant to this appeal, the court concluded:

> [T]he seizure involving the defendant was based upon reasonable suspicion; the defendant has standing to challenge the subsequent search of the vehicle; the initial search of the vehicle was based upon consent; [and] the extended search of the vehicle's exterior rocker panels was based upon consent and further probable cause . . . .

B. Trial

The appellant's case proceeded to trial on May 15, 2000. As at the suppression hearing, the State presented the testimonies of both Officer Kohl and Officer Hunter. Hunter's testimony at trial was substantially identical to his testimony at the suppression hearing. Kohl also reiterated much of her testimony at the suppression hearing but added a description of her duties as a member of the Highway Interdiction Unit:

> Basically, what we do is, we sit on the side of the interstate and monitor the flow of traffic. And, we see traffic violations that occur, we – uh – pull the violator and the vehicle over and issue them a warning ticket, speeding ticket. And, uh – from there, sometimes we get stolen vehicles; we get fugitives from justice; we get people with weapons; uh – we get people with narcotics, just an array of different things.

She related to the jury that the location of the traffic stop in this case "is one of the busiest [ ]sections of the interstate system in [Nashville]." She asserted that she stopped the appellant's vehicle because, in addition to suspecting the appellant of intoxication, she was concerned that "possibly he was sleepy, was getting tired and maybe he's gonna fall asleep at the wheel."

Kohl also added at trial that she was unable to see inside the appellant's vehicle prior to making the traffic stop because the windows of the vehicle were tinted. Only when she stopped the appellant's vehicle and the appellant rolled down his window was she able to see both the appellant and the condition of the interior of his vehicle. In particular, she noted that the interior was littered with empty Coca-Cola cans, empty juice bottles, and half-eaten sandwiches. The appellant explained to her that he had traveled almost nonstop from California and intended to visit his cousin in Georgia for a couple of weeks. Kohl recalled that, notwithstanding the appellant's claim that he was pausing briefly at rest stops and napping in his vehicle, there were no blankets or pillows in the vehicle.

In addition to the appellant's responses to her questions concerning his destination and the ownership of his vehicle, the nonstop nature of the appellant's journey, reflected by the condition of the interior of his vehicle, suggested to Kohl the possibility that the appellant was engaged in the transportation of illegal drugs. Moreover, a can of air freshener was located on the center console of the vehicle, and Kohl could detect the odor of air freshener inside the vehicle, albeit the odor was "very minute." Kohl observed that air freshener is "commonly used by people hauling drugs to mask the odor of the narcotic that they're hauling." According to Kohl, her suspicion that the appellant

was transporting illegal drugs prompted her radio call to Officer Hunter and her preparation of a Spanish "Consent to Search" form.

Kohl emphasized at trial that, upon returning to the appellant his driver's license and vehicle registration document and issuing a warning citation, she "told him to have a safe trip and the stop is complete"; she allowed him to begin walking toward his vehicle; and she turned to begin walking toward her patrol car. Kohl recounted, "[A]fter he started back to his car and I had started back to mine, then, I said, 'Excuse me. Can I ask you a couple of questions?' And, so, he walks over to where I'm at, he shakes his head, and he says, 'Yes.'"

During the ensuing encounter, Kohl's suspicion of the appellant was heightened even further when the appellant immediately offered to open his trunk in response to her request to search his vehicle. She noted, "[I]n the past when I found drugs that weren't in the trunk, people always want you to look in the trunk. And, to me, they're trying to divert my attention away from where they are. They want me to look in the trunk." That having been said, she also testified that, of the several hundred traffic stops that she performed while working with the Twentieth Judicial District Drug Task Force, approximately ten traffic stops resulted in the seizure of drugs.

Kohl also clarified at trial that Hunter and his drug-detection dog Lou arrived as she was seated in her patrol car completing the appellant's warning citation. Hunter and Lou remained in their patrol car while Kohl requested and obtained the appellant's consent to search his vehicle. Kohl recalled that the appellant could see Hunter's patrol car parked behind her own, but she was uncertain if the

appellant was aware of the presence of a drug-detection dog inside Hunter's patrol car. A third officer arrived after Lou had already signaled the presence of illegal drugs in the appellant's vehicle.

During the officers' search, the appellant stood approximately fifteen feet away from his vehicle and was able to observe their activities. Prior to examining the rocker panels, the officers detached the seats and lifted carpeting inside the passenger compartment of the vehicle. Additionally, the officers climbed inside the trunk, lifted the carpeting, and removed the spare tire. Finally, the officers examined the vehicle's engine, removing the top of the air filter. At no time prior to the discovery of the bundles of methamphetamine did the appellant express any objection to the scope of the officers' search. The officers ultimately removed bundles of methamphetamine from rocker panels on both the driver's side and the passenger's side of the appellant's vehicle.

Following the appellant's arrest, Kohl questioned him concerning his knowledge of the drugs. Notwithstanding the appellant's claim that he spoke "[a] little bit" of English and Kohl's limited proficiency in Spanish, Kohl obtained the assistance of a Spanish-speaking officer in both advising the appellant of his *Miranda* rights and questioning the appellant. By means of the interpreter, the appellant denied any knowledge of the drugs. However, in contrast to his earlier statements to Kohl, the appellant now acknowledged that he was traveling to "Forest Park" in Georgia. The appellant also provided Kohl, from memory, the pager number belonging to his cousin Miguel, whom he had intended to visit in Georgia. The appellant declined Kohl's invitation to "roll over, meaning, . . . do a control delivery, meaning . . . take the dope on to where it

needed to go, as if he hadn't been intercepted or stopped." Kohl noted that the appellant was not carrying large amounts of currency or a pager at the time of his arrest. He did have in his possession an America West Airlines ticket stub marked "IAH" and a business card belonging to the managers or owners of a Super 8 Motel in Houston, Texas.

After questioning the appellant, Kohl telephoned the pager number provided by the appellant. She discovered that the number was, in fact, assigned to a residence rather than a pager. A woman answered the telephone and informed Kohl that there was no one named Miguel living at that residence. Kohl also investigated the license plate number of the vehicle driven by the appellant and the vehicle registration. She discovered that, although the vehicle registration number was assigned to a Fernandez Orosco Efrain in Los Angeles, California, the license plate number was assigned to a Manuel Gonzales in the same city.

In addition to the testimonies of Kohl and Hunter, the State presented the testimony of Kathy Carman, a chemist employed by the Tennessee Bureau of Investigation (hereinafter the TBI) at the TBI Crime Laboratory. She related that she performed testing on the substance contained in each of the twenty-eight bundles seized by police from the vehicle driven by the appellant on May 9, 1999. She discovered that the bundles contained methamphetamine and weighed a total amount of 40.1 pounds or a little more than eighteen thousand grams.

The State next presented the testimony of Daniel Rosales, an officer employed by the Houston Police Department in Texas. He testified that he had been a police

officer for seventeen years and had participated in drug investigations for twelve years. He noted that he was currently assigned to a federal DEA task force known as the "High Intensity Drug Trafficking Area Task Force" (hereinafter the HIDTA) and had been so assigned for six years. He related that the mission of HIDTA was to investigate criminal organizations dealing in illegal drugs. During the course of his assignment to HIDTA, he had investigated approximately forty or fifty different criminal organizations dealing in marijuana, cocaine, heroin, methamphetamine, and various other, synthetic drugs. The investigations spanned many areas of the country, including Texas, Tennessee, California, New York, New Jersey, Illinois, and Missouri.

As to his specific tasks, Rosales related that his job entailed working undercover on one occasion as a buyer for an organization dealing in heroin and methamphetamine. He also participated in the execution of more than five hundred search warrants. Additionally, he noted, "I've interviewed people that were selling drugs on the corners; I've interviewed people that are transporting drugs; I've interviewed the top of an organization. At one point or another, I've interviewed pretty well every level of an organization." In particular, he had interviewed at least fifty drug couriers.

Based upon his experience, Rosales testified concerning the care with which criminal organizations select their drug couriers:

> The transportation is – is – you're gonna be getting someone that is trusted within the organization. I mean, sometimes it's family, sometimes it's a referral from a friend within the organization. If – if I recommend this lady right here and I'm

> in the organization and she loses a load, then, I'm held responsible. So, there is never going to be anybody that's not trusted within the organization.

Rosales observed that, sometimes, organizations further ensure the delivery of drugs by threatening the couriers and by requiring that couriers periodically call a cellular telephone or a pager, using codes in order to communicate the progress of their journey. He noted that the most common mode of transporting illegal drugs within the United States of America (hereinafter the USA) is automobile or truck.

Rosales further related to the jury that the street value of methamphetamine in Houston is one hundred dollars per gram, albeit he acknowledged that the street value in Houston is "the higher retail end." Accordingly, the street value of the methamphetamine seized from the appellant would be approximately 1.8 million dollars. Rosales noted that a courier's fee is based upon the quantity of drugs transported. He remarked that the quantity of drugs at issue in this case was even greater than the quantity generally transported by the organizations that he investigated.

Finally, Rosales examined the America West Airlines ticket stub found in the appellant's possession at the time of his arrest. He confirmed that America West Airlines operates flights to and from Houston, Texas. Moreover, he testified that the initials "IAH" written on the ticket stub signifies "Intercontinental Airport of Houston."

The appellant testified on his own behalf through an interpreter. He informed the jury that he was born in Guatemala, where he attended school through the sixth

grade. He came to the USA on February 22, 1989, when he was eighteen years old. His parents and five of his brothers still resided in Guatemala, but one of his brothers and several uncles and cousins had immigrated, like him, to the USA. The appellant's native language is Spanish, although he understands "[s]ome words" in English.

The appellant further informed the jury that he was currently married to a woman from Mexico named Gurdaluepe Polideo and had three children, the youngest having been born only two months before the instant offense. Prior to this offense, the appellant worked full-time installing and re-finishing hardwood floors. He was an independent contractor and earned a net income of approximately twenty-five thousand dollars each year. Nevertheless, he was able to save sufficient funds to satisfy in cash hospital bills stemming from the birth of his youngest child. He noted that, although his family did not possess health insurance, he "found a cheap program for the delivery."

As to the instant offense, the appellant related to the jury that he and his wife had also saved funds in preparation for a trip to visit his cousin Miguel Avila in Georgia. Accordingly, the appellant had five hundred dollars with him at the time of Kohl's traffic stop of his vehicle, in addition to funds in his bank account. The appellant asserted that both he and his wife had been planning the trip for several months, but his wife ultimately decided that she would not accompany him due to the recent birth of their youngest child. Nevertheless, the appellant decided to visit his cousin as planned. He asserted that he knew his cousin well, although he denied that he had ever used his cousin's "pager" number, having memorized the number solely for the purpose of his trip to Georgia.

According to the appellant, he intended to stay in Georgia for approximately one and one-half or two weeks.

The appellant additionally testified that a co-worker and friend named Efrain Orosco loaned him a car three days prior to his trip. Specifically, Orosco asked the appellant to care for his car while Orosco was on vacation for one month in Mexico. Orosco was also a friend of the appellant's cousin, Miguel, and was aware of the appellant's planned trip to Georgia. Accordingly, notwithstanding his ownership of a 1994 Chevrolet Suburban, the appellant decided to use Orosco's 1990 Pontiac Bonneville for the lengthy trip. The appellant noted that he had exclusive control of Orosco's vehicle during Orosco's absence. He denied that Orosco ever asked or required that the appellant drive the Pontiac Bonneville to Georgia.

The appellant only partly disputed Kohl's account of the traffic stop of his vehicle on Interstate Highway 24 in Davidson County. He denied ever stating to Kohl that he did not know his destination in Georgia. Moreover, he denied ever stating that a cousin owned the vehicle that he was driving. Finally, he denied ever offering to open his trunk for Kohl's inspection following her request to search his vehicle. However, he conceded that Kohl only requested his permission to search his vehicle after issuing him a warning citation and informing him that the stop was over and that he was free to leave. He confirmed that, prior to obtaining his consent, Kohl showed him the "Consent to Search" form written in Spanish. Finally, he acknowledged that he consented in writing to the search of his vehicle with a full awareness of his right to refuse consent and his right to revoke his consent at any time.

The appellant also presented the testimony of his wife, Gurdaluepe Moran Polideo Garcia. She stated that her husband was an excellent worker, specializing in hardwood floors, and that he was able to meet all the financial needs of his family. She noted that, other than his trip to Georgia, the appellant had only taken vacations with her, driving with her to visit family in Bull Head City, Arizona. She denied that she or her husband had ever flown to Arizona or to Houston, Texas.

The appellant next presented the testimony of Miguel Bouquet. Bouquet testified that he lived in Venice, California, and owned a business known as Bouquet Floors. Bouquet noted that he had owned his business for approximately twelve or fourteen years, and the appellant had worked for him approximately twenty or twenty-five times during the past four or five years. Bouquet asserted that the quality of the appellant's work was "very good," and the appellant was reliable.

Finally, the appellant presented the testimony of his nephew, Rubin Munez Palidio. Palidio testified that he lived in Bull Head City, Arizona. He observed that his uncle was a good man and had always treated others well. Palidio further related that he had previously worked with his uncle, describing his uncle as a hard worker. Finally, he denied that his uncle maintained a "luxurious" lifestyle, asserting that his uncle's lifestyle was "normal."

At the conclusion of the appellant's trial, the jury found the appellant guilty of possession of one thousand grams or more of methamphetamine with intent to deliver. The trial court conducted a sentencing hearing on June 30, 2000, at the conclusion of which it imposed a sentence of twenty years incarceration in the Tennessee Department

of Correction. The appellant challenges his conviction in this appeal.

II. Analysis

A. Trial Court's Denial of Appellant's Motion to Suppress

The appellant first contends that the trial court erred in denying his pre-trial motion to suppress any evidence obtained during or as a result of Kohl's traffic stop of his vehicle. His argument is three-fold: First, relying largely upon our supreme court's decision in *State v. Binette,* 33 S.W.3d 215 (Tenn. 2000), the appellant argues that Officer Kohl did not possess a reasonable suspicion at the time of the traffic stop that he had committed, was committing, or was about to commit a criminal offense. Second, the appellant argues that, even assuming the legality of the traffic stop at its inception, the scope of the stop soon exceeded its justification. Third and finally, the appellant argues that the search of his vehicle exceeded the scope of his consent.

In response, the State seeks to distinguish *Binette* from the instant case and broadly argues that "Officer Kohl was justified in stopping the [appellant] to ascertain his condition, as a matter of public safety." Second, the State disputes the appellant's argument that the scope of the traffic stop exceeded its justification. Finally, the State argues that the police officers' search of the appellant's vehicle was within the scope of the appellant's unqualified consent and was further warranted by the drug-detection dog's positive indication of the presence of illegal drugs in the vehicle.

i.

When reviewing a trial court's ruling on a motion to suppress evidence obtained by police pursuant to a warrantless search or seizure, this court is obliged to uphold the trial court's findings of fact unless the evidence preponderates otherwise. *State v. Keith,* 978 S.W.2d 861, 864 (Tenn. 1998); *State v. Odom,* 928 S.W.2d 18, 23 (Tenn. 1996); *State v. Ashworth,* 3 S.W.3d 25, 29 (Tenn. Crim. App. 1999). In this regard, our supreme court has observed:

> Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is [therefore] entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence.

Odom, 928 S.W.2d at 23. The court has recently reaffirmed that "the standard of appellate review for findings of fact at a suppression hearing is that articulated by this Court in *Odom.*" *State v. Walton,* 41 S.W.3d 75, 81 n.3 (Tenn. 2001). However, it has also expressed the following qualification: "[W]hen a trial court's findings of fact at a suppression hearing are based on evidence that does not involve issues of credibility, a reviewing court must examine the record de novo without a presumption of correctness." *Binette,* 33 S.W.3d at 217; *see also State v. Munn,* 56 S.W.3d 486, 494 (Tenn. 2001). In any event, an appellate court's review is not limited to the transcript of the suppression hearing but extends to the entire record of proceedings, including the trial transcript. *State v. Henning,*

975 S.W.2d 290, 299 (Tenn. 1998). Moreover, an appellate court will also review de novo the trial court's application of the law to factual findings. *State v. Crutcher,* 989 S.W.2d 295, 299 (Tenn. 1999); *Keith,* 978 S.W.2d at 864.

ii.

Turning first to the legality of the traffic stop at its inception, both the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution protect citizens against unreasonable searches and seizures conducted by law enforcement officers. In essence, "[t]he purpose of the Fourth Amendment and article I, § 7 is to 'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" *Munn,* 56 S.W.3d at 494; *see also State v. Downey,* 945 S.W.2d 102, 106 (Tenn. 1997) (observing that "'article I, section 7 is identical in intent and purpose with the Fourth Amendment,'" and federal cases interpreting the Fourth Amendment should be regarded as particularly persuasive). Accordingly, under both the United States and Tennessee constitutions, searches and seizures conducted without a warrant are presumptively unreasonable subject to a few carefully defined exceptions. *See Coolidge v. New Hampshire,* 403 U.S. 443, 454-455, 91 S. Ct. 2022, 2032 (1971); *Keith,* 978 S.W.2d at 865; *State v. Yeargan,* 958 S.W.2d 626, 629 (Tenn. 1997). Because stopping an automobile and detaining its occupants unquestionably constitute a seizure, *Wren v. United States,* 517 U.S. 806, 809-810, 116 S. Ct. 1769, 1772 (1996); *United States v. Sharpe,* 470 U.S. 675, 682, 105 S. Ct. 1568, 1573 (1985); *Delaware v. Prouse,* 440 U.S. 648, 653, 99 S. Ct. 1391, 1396 (1979); *Binette,* 33 S.W.3d at 218; *Yeargan,* 958 S.W.2d at 630; *State v. Pulley,* 863 S.W.2d 29,

30 (Tenn. 1993), it follows that, when the State seeks to introduce in a criminal trial evidence obtained as a result of the warrantless stop of an automobile, the State carries the burden of demonstrating by a preponderance of the evidence the applicability of an exception to the warrant requirement, *Keith,* 978 S.W.2d at 865; *Yeargan,* 958 S.W.2d at 629.

One exception to the warrant requirement is an arrest based upon probable cause to believe that a crime has been or is being committed. *Beck v. Ohio,* 379 U.S. 89, 91, 85 S. Ct. 223, 225-226 (1964); *Henning,* 975 S.W.2d at 300; *see also* Tenn. Code Ann. § 40-7-103 (1997). "Probable cause exists where 'the facts and circumstances within the [ ] [officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States,* 338 U.S. 160, 175-176, 69 S. Ct. 1302, 1310-1311 (1949) (alterations in original) (quoting *Carroll v. United States,* 267 U.S. 132, 162, 45 S. Ct. 280, 288 (1925)). Probable cause will justify an arrest for even very minor criminal offenses committed in an officer's presence. *Atwater v. City of Lago Vista,* 532 U.S. 318, ___, 121 S. Ct. 1536, 1557 (2001); *State v.. Walker,* 12 S.W.3d 460, 464 (Tenn. 2000). However, in Tennessee, the constitutionality of such arrests will depend upon the officer's compliance with Tenn. Code Ann. § 40-7-118 (1997). *Walker,* 12 S.W.3d at 464-468.

Additionally, in *Terry v. Ohio,* 392 U.S. 1, 20, 88 S. Ct. 1868, 1879-1880 (1968), the United States Supreme Court indicated that a warrantless seizure short of an arrest might be justified by something less than probable cause. This proposition was subsequently confirmed by the

United States Supreme Court in *Adams v. Williams,* 407 U.S. 143, 145-146, 92 S. Ct. 1921, 1923 (1972), and extended to investigatory stops of automobiles in *United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 95 S. Ct. 2574, 2580 (1975); *see also United States v. Hensley,* 469 U.S. 221, 226, 105 S. Ct. 675, 679 (1985). Thus, a police officer may stop an automobile based upon reasonable suspicion, supported by specific and articulable facts, that the occupants of the automobile have committed, are committing, or are about to commit a criminal offense. *Binette,* 33 S.W.3d at 218; *State v. England,* 19 S.W.3d 762, 766 (Tenn. 2000); *Keith,* 978 S.W.2d at 865 (citing, among other authorities, *United States v. Cortez,* 449 U.S. 411, 417, 101 S. Ct. 690, 694 (1981), and *Prouse,* 440 U.S. at 663, 99 S. Ct. at 1401). While requiring considerably less than proof of wrongdoing by a preponderance of the evidence, a reasonable suspicion requires something more than the officer's inchoate and unparticularized suspicion or hunch. *United States v. Sokolow,* 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989); *Keith,* 978 S.W.2d at 867.

Either probable cause or reasonable suspicion will justify a traffic stop under the United States and Tennessee constitutions without regard to the subjective motivations of the police officer involved. *Wren,* 517 U.S. at 813, 116 S. Ct. at 1774; *United States v. Morales,* 252 F.3d 1070, 1074 (9th Cir. 2001); *United States v. Villa-Chaparro,* 115 F.3d 797, 801 (10th Cir. 1997); *Vineyard,* 958 S.W.2d at 736; *cf. generally City of Indianapolis v. Edmond,* 531 U.S. 32, 45-46, 121 S. Ct. 447, 456-457 (2000). In short, the touchstone is reasonableness, whether under the state or federal constitution, *State v. Jennette,* 706 S.W.2d 614, 618 (Tenn. 1986), and "[r]easonableness, in turn, is measured

in objective terms by examining the totality of the circumstances," *Ohio v. Robinette,* 519 U.S. 33, 39, 117 S. Ct. 417, 421 (1996).

The trial court in this case rejected any claim by the State that Officer Kohl possessed probable cause to believe that the appellant was driving carelessly in violation of Metropolitan Nashville Code § 12.68.170, noting that Kohl did not testify at the suppression hearing that "the purpose of the stop was based on a violation of § 12.68.170 of the Metropolitan Traffic Code ... [and] the warning citation issued did not reference the cited section of the Metro Code, nor did it state 'careless driving.'" Instead, the trial court determined that Officer Kohl possessed a reasonable suspicion that the appellant was driving under the influence in violation of Tenn. Code Ann. § 55-10-401 (1998). In this regard, the court accredited Kohl's testimony at the suppression hearing, observing:

> The Court has reviewed the video tape recorded by Officer Kohl and finds that it does support her testimony. As she approaches the defendant's vehicle from two lanes over, it noticeably swerves to the right side of the lane. The Court finds it significant that the officer did not immediately stop the vehicle, but rather, began to monitor the vehicle to determine whether the swerving would continue. In reviewing the video, the Court noted two other times, approximately 20 and 65 seconds from the officer's initial observation ... , that the defendant's vehicle noticeably swerves from one side of the lane to the other. Also significant, and in further support of the officer's testimony, is the fact that there were several other vehicles traveling parallel to and in close proximity to the defendant's vehicle. This supports her testimony regarding the safety of the

> other motorists on the road. In addition, the Court would note that for a short period of time the defendant's vehicle is not on the videotape and could only have been observed by the officer. During this occasion and the initial observations made at the time when the defendant's vehicle was several car lengths ahead of the officer, only the officer, not the videotape, could accurately observe the defendant's driving pattern. While the Court would not necessarily classify the defendant's driving as "erratic," it was clearly characteristic of a driver who was either intoxicated or about to fall asleep at the wheel. The fact that there were other vehicles in close proximity to the defendant amplified the situation. As it turned out, the defendant admitted that he was very tired and had been driving for a long period of time, which confirmed the officer's suspicion.

In reviewing the trial court's determinations, we preliminarily note the following observation by the United States Supreme Court in *Ornelas v. United States,* 517 U.S. 690, 696-697, 116 S. Ct. 1657, 1661-1662 (1996) (alterations in original) (quoting *Pullman-Standard v. Swint,* 456 U.S. 273, 289 n.19, 102 S. Ct. 1781, 1791 n.19 (1982)):

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or established, the rule of law

> is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."

Thus, we review de novo the trial court's ultimate determination of whether the "historical facts" in this case amount to probable cause or reasonable suspicion. *State v. Burns,* 6 S.W.3d 453, 461 (Tenn. 1999) ("Cases that involve mixed questions of law and fact are subject to de novo review."). *But see State v. Long,* 694 S.W.2d 337, 339 (Tenn. Crim. App. 1985) ("The trial court's finding as to probable cause is to be given the weight of a jury verdict and is conclusive in this court unless the evidence preponderates against that judgment."). The more difficult question is whether we should accord the trial court's findings of "historical facts" a presumption of correctness.

Relying upon *Binette,* 33 S.W.3d at 217, the appellant asserts that the recording of the traffic stop on videotape precluded "the normal deference given to trial courts on the basis of their unique position to observe the demeanor and conduct of witnesses," warranting instead an examination of the record de novo without a presumption of correctness. The State responds that, in contrast to *Binette, id.* at 216, the trial court in this case relied upon Officer Kohl's testimony in addition to the videotape in making its findings of fact. The State emphasizes the trial court's observation that, at times, "only the officer, not the videotape, could accurately observe the defendant's driving pattern." Accordingly, the State concludes that "the standard of review set forth in [*Odom,* 928 S.W.2d at 23,] is more properly applicable" to the trial court's findings of fact.

In *Binette,* 33 S.W.3d at 217, the supreme court explained that, when a trial court's findings of fact on a motion to suppress are based *solely* on evidence that does not involve issues of credibility, an appellate court "is in the same position as the trial court and is just as capable of reviewing the evidence." Accordingly, we agree with the State that, if the trial court had based its findings of fact on testimony by Kohl relating to the appellant's driving during those moments on the videotape recording when the appellant's vehicle is obscured from view due to the relative positions of the vehicle and Kohl's patrol car, the lighting conditions on the interstate, and other vehicles traveling on the interstate, this court would not be in the same position as the trial court in reviewing the evidence, and the *Odom* standard would apply. However, in its order denying the appellant's motion to suppress, the trial court ultimately cites its own observations of the videotape recording in support of its determination of reasonable suspicion. Indeed, the court could cite nothing else as Kohl did not testify at the suppression hearing or at trial that the appellant's vehicle engaged in any additional weaving during those moments on the videotape recording when it is obscured from view.

In any event, our de novo review of the videotape of the traffic stop in this case substantiates the trial court's findings that the appellant's vehicle drifted to the right side of its lane as Kohl began to drive past the vehicle, and the vehicle wove slowly from one side of its lane to another and back again on at least two additional occasions. Our review of the videotape also substantiates the trial court's observation of the presence of other vehicles in close proximity to the appellant's. Accordingly, we proceed to a determination of "whether these historical facts, viewed

from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Ornelas,* 517 U.S. at 696, 116 S. Ct. at 1661-1662.

The State effectively conceded in the trial court and now concedes on appeal that the appellant was driving in compliance with Tenn. Code Ann. § 55-8-123(1) (1998), which statutory provision states:

> Whenever any roadway has been divided into two (2) or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety . . . .

The State did, however, attempt to argue at the suppression hearing that the appellant was driving his vehicle in violation of Metropolitan Nashville Code § 12.68.170, which section proscribes driving carelessly "so as . . . to endanger the life, limb or property of any person." As noted by the trial court, Officer Kohl at no time claimed reliance upon or even knowledge of this metropolitan code section in stopping the appellant's vehicle. Nevertheless, "an arrest is not rendered unlawful by the fact that an officer who has authority to make an arrest for a particular offense erroneously states he is making an arrest for some other offense, or even for a cause which is not in fact an offense, or states the offense inaccurately." *State v. Robinson,* 622 S.W.2d 62, 68 (Tenn. Crim. App. 1980).[4]

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[4] *See also United States v. Lester,* 647 F.2d 869, 873 (8th Cir. 1981) (holding that the "the validity of the arrest should be judged by whether the arresting officers actually had probable cause for the arrest, rather

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Notably, the State does not include this argument in its brief on appeal. In any event, as we conclude during our discussion below, the record simply does not reflect that, at the time of the traffic stop, the appellant was currently endangering "the life, limb or property of any person." Metropolitan Nashville Code § 12.68.170.

Our supreme court has acknowledged in the past that one of the first indications of drunk driving is "zigzagging down the road or driving in an unnatural fashion." *Ervin v. State,* 268 S.W.2d 351, 353 (Tenn. 1954). Yet, more recently, in *Binette,* 33 S.W.3d at 219, our supreme court refused to conclude that the weaving of an automobile within its own lane that is neither "pronounced" nor "exaggerated" affords an officer reasonable suspicion of the

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than by whether the officers gave the arrested person the right reason for the arrest"); *United States v. Saunders,* 476 F.2d 5, 7 (5th Cir. 1973) (holding that, "[w]hen an officer makes an arrest, which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest"); *State v. Munoz,* 965 P.2d 349, 352 (N.M. Ct. App. 1998) (holding that "[t]he subjective belief of the officer does not in itself affect the validity of the [traffic] stop; it is the evidence known to the officer that counts, not the officer's view of the governing law"); WAYNE R. LAFAVE, 1 *SEARCH AND SEIZURE*, § 1.4(d), at 110-111 (3d ed.1996) (observing that the exclusion of evidence solely due to an officer's mistaken statement of the grounds for an arrest is unjustified "because such situations are often attributable to complicated legal distinctions between offenses or an officer's failure to record all the bases or the strongest basis upon which the arrest was made"); *cf. Florida v. Royer,* 460 U.S. 491, 507, 103 S. Ct. 1319, 1329 (1983) (observing that "the fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying [defendant's] custody by proving probable cause").

driver's intoxication. Similarly, this court has noted its reluctance

> to conclude that a person driving in a manner that an officer deems "improper," when the driving is not erratic or haphazard and does not create a dangerous situation, is subject to seizure while proceeding along a highway in a lawful manner. Only the hypothetical "perfect" driver would not be subject to seizure if we were to hold that minor driving "errors," which neither violate our traffic code nor create a hazard, indicate that a person might be intoxicated."

State v. Smith, 21 S.W.3d 251, 258 (Tenn. Crim. App. 1999); *see also State v. Don Palmer Black,* No. 03C01-9812-CR-00424, 1999 WL 1273510, at *5 (Tenn. Crim. App. at Knoxville, December 29, 1999).[5]

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[5] *Cf. People v. Perez,* 221 Cal. Rptr. 776, 778 (Cal. App. Dep't Super. Ct.1985) ("[P]ronounced weaving within a lane provides an officer with reasonable cause to stop a vehicle on suspicion of driving under the influence where such weaving continues for a substantial distance"); *Roberts v. State,* 732 So.2d 1127, 1128 (Fla. Dist. Ct. App. 1999) ("[C]ontinuous weaving, even if only within [a motorist's own] lane, during the time that she was being followed presented an objective basis for suspecting that she was under the influence."); *State v. Bailey,* 624 P.2d 663, 664 (Or. Ct. App. 1981) ("[T]he observation of a vehicle weaving within its own lane for a substantial distance gives rise to probable cause to believe that the driver is driving under the influence of intoxicants and justifies a stop for further investigation."); *Commonwealth v. Baumgardner,* 767 A.2d 1065, 1068 (Pa.Super.Ct.2001) (holding that, in order to provide an officer with reasonable suspicion to stop a motorist on suspicion of driving under the influence, the weaving of an automobile within its own lane must be "'excessive,'" "'pronounced,'" or "'exaggerated'" as opposed to "'slight,'" "'minimum,'" or "'subtle'"); *Neal v. Commonwealth,* 498 S.E.2d 422, 425 (Va. Ct. App. 1998) ("An isolated instance of mild weaving within a lane is not

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In *Binette,* 33 S.W.3d at 218 & 218 n. 2, the supreme court distinguished several cases in which the "police observed the defendant weave in a pronounced manner to the outside and inside boundaries of the lane." In particular, we note that the court distinguished the case of *State v. Tompkins,* 507 N.W.2d 736, 737 & 740 (Iowa Ct. App. 1993), in which the Iowa court found reasonable suspicion of a defendant's intoxication when the police officer followed the defendant's automobile for one mile and, during this distance, observed the defendant's car weave in its own lane of traffic between the center line and the right side boundary line four or five times. We have difficulty distinguishing *Tompkins* from the instant case. Nevertheless, two members of the panel of judges reviewing the instant case, including both the author of this opinion and Judge Smith, participated in *State v. Guy Binette,* No. 03C01-9802-CR-00075, 1999 WL 427606 (Tenn. Crim.App. at Knoxville, June 28, 1999), *reversed by Binette,* 33 S.W.3d at 220.[5] Recollecting the videotape of Binette's traffic stop, we must conclude that the appellant's vehicle in this case was weaving in neither a pronounced nor exaggerated manner.

That having been said, the supreme court in *Binette,* 33 S.W.3d at 219, cautioned that "[t]he number of times that a vehicle touches the center line or drifts within . . . a lane is not dispositive . . . . Rather, . . . a court must consider the totality of the circumstances in determining

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sufficiently erratic to justify an investigatory stop [of an automobile]. The test is one of reasonableness under 'the totality of circumstances.' ").

[6] Judge Smith filed a dissenting opinion.

whether reasonable suspicion was present at the time a stop was initiated." *See generally Cortez,* 449 U.S. at 417-418, 101 S. Ct. at 695. The totality of circumstances "includes, but is not limited to, objective observations, information obtained from other police officers or agencies, information obtained from citizens, and the rational inferences and deductions that a trained police officer may draw from the facts and circumstances." *State v. Harper,* 31 S.W.3d 267, 271 (Tenn. Crim. App. 2000); *see also State v. Simpson,* 968 S.W.2d 776, 783 (Tenn. 1998).

Viewing the totality of circumstances in this case, we note that, in contrast to the defendant in *Binette,* 33 S.W.3d at 219, the appellant did not successfully negotiate intersections, stop lights, and winding roads immediately prior to Kohl's traffic stop of his vehicle. Rather, he was traveling on an interstate highway and was confronted with only occasional and gradual curves. Moreover, in contrast to *Binette, id.* at 218, there was considerable traffic on the highway, heightening the *potential* danger to other motorists. Certainly, an officer is not required to postpone an investigative seizure until a motorist has a wreck. *Cf. Ervin,* 268 S.W.2d at 353. As noted by the United States Supreme Court in *Terry,* 392 U.S. at 20-21, 88 S. Ct. at 1879 (quoting *Camara v. Municipal Court,* 387 U.S. 523, 534-535 & 536-537, 87 S. Ct. 1727, 1735 (1967)), when assessing the reasonableness of an investigatory seizure, "it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to . . . seize . . . against the invasion which the . . . seizure . . . entails.'" *See also Pulley,* 863 S.W.2d at 33 (observing that "the

gravity of the perceived harm is a crucial element in assessing the reasonableness of an investigative *Terry* stop"). Nevertheless, even when viewed in the context of the totality of circumstances, the weaving of the appellant's vehicle in this case was simply insufficient to justify Kohl's stop of the appellant's vehicle based upon a reasonable suspicion of the appellant's intoxication.

Underscoring our conclusion, we also reject any contention that the officer's suspicion that the appellant was falling asleep afforded her an independent basis for the seizure. In *Mincey v. Arizona,* 437 U.S. 385, 392, 98 S. Ct. 2408, 2413 (1978) (quoting *Wayne v. United States,* 318 F.2d 205, 212 (D.C. Cir. 1963)), the Supreme Court observed, "'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" Correspondingly, the Court has noted:

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Cady v. Dombrowki, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528 (1973). Whether relying upon a theory of exigency, a "community caretaking functions" doctrine, or both, several courts have acknowledged that probable cause to believe or reasonable suspicion of *criminal activity* may not be a necessary prerequisite to an officer's investigative stop of an automobile or other seizure. *See, e.g., United States v. Gregory,* 79 F.3d 973, 978 (10th Cir. 1996); *Russoli v. Salisbury Township,* 126 F.Supp.2d 821, 846-848 (E.D. Penn. 2000); *State v. Field,* 847 P.2d 1280, 1283-1284 (Kan. 1993); *Rowe v. State,* 769 A.2d 879, 890-891 (Md. Ct. App. 2001); *State v. Pinkham,* 565 A.2d 318, 319 (Me. 1989); *Barrett v. Commonwealth,* 462 S.E.2d 109, 111-112 (Va. 1995). However, as noted previously, the appellant's driving in this case did not constitute an imminent threat of injury or death to himself or others, and Kohl herself conceded that her stop of the appellant's automobile was not "divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Dombrowki,* 413 U.S. at 441, 93 S. Ct. at 2528.[7]

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[7] In *State v. Jennifer Gale McClure,* No. W2000-01822-CCA-R3-CD, 2001 WL 720649, at *10 n.2 (Tenn. Crim. App. at Jackson, June 27, 2001), we acknowledged that, outside the context of an officer's probable cause to believe or reasonable suspicion of criminal activity, whether an intrusion upon an individual's privacy or personal security is completely pretextual may indeed be relevant. *Cf. also Edmond,* 531 U.S. at 45-46, 121 S. Ct. at 456-457. That said, we emphasize that we are referring here to Kohl's belief that the appellant was intoxicated and not to the appellant's contention that Kohl's traffic stop of his automobile was otherwise pretextual.

iii.

Assuming in anticipation of further appellate proceedings that the traffic stop of the appellant's vehicle was lawful at its inception, an investigative detention may violate the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution "by virtue of its intolerable intensity and scope." *Terry,* 392 U.S. at 18-20, 88 S. Ct. at 1878-1879; *see also Simpson,* 968 S.W.2d at 783. In other words, the officer's interference with a person's constitutionally protected liberty interests must be *both* justified at its inception and reasonably related in scope to those circumstances justifying the interference. *Terry,* 392 U.S. at 19-20, 88 S. Ct. at 1879. With respect to the lawful scope of an investigative detention, a plurality of the United States Supreme Court has elaborated that

> an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325-1326 (1983); *see also Sharpe,* 470 U.S. at 686, 105 S. Ct. at 1575 (observing that, when assessing whether a detention is too long to be justified as an investigative stop, the proper inquiry is whether the police "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to

detain the defendant"); *Simpson,* 968 S.W.2d at 783 (citing *Sharpe,* 470 U.S. at 686, 105 S. Ct. at 1575).[8] The reasonableness of the scope of a traffic stop, like the reasonableness of its justification, will be measured in objective terms without regard to the subjective intentions of the officer. *Robinette,* 519 U.S. at 38, 117 S. Ct. at 420-421.

In this case, the appellant contends that Kohl's inquiries concerning the appellant's destination, the ownership of his vehicle, his occupation, and his record of traffic violations and arrests were unrelated to the justification for or purpose of the traffic stop, i.e., ascertaining whether the appellant was intoxicated or falling asleep at the wheel. Similarly, he contends that Kohl's subsequent radio call to Officer Hunter requesting

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[8] Some courts have distinguished for analytical purposes between the "scope" of an investigative detention and the "duration" of an investigative detention, the former term evidently referring exclusively to the investigative methods employed by police during the detention. *See, e.g., United States v. Purcell,* 236 F.3d 1274, 1277-1280 (11th Cir. 2001). While purely a matter of semantics, we find it more useful to consider both the duration of the traffic stop and the investigative methods employed by police during the stop to be interrelated facets of the detention's scope. Concededly, the Supreme Court has indicated that, "if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop," regardless of the efficiency of investigative methods employed by the police. *Sharpe,* 470 U.S. at 685, 105 S. Ct. at 1575. Conversely, some courts have suggested that certain police investigative methods may violate constitutional proscriptions regardless of their impact upon the duration of the traffic stop. *Cf. United States v. Holt,* 264 F.3d 1215, 1228-1229 (10th Cir. 2001) (en banc), and *United States v. Shabazz,* 993 F.2d 431, 436 (5th Cir. 1993). Generally, however, the reasonableness of a traffic stop's duration will be judged by reference to the police investigative methods occasioning that duration, and the reasonableness of police investigative methods will be judged, at least in part, by reference to the time required for their completion.

the presence of a drug-detection dog at the scene of the traffic stop and her preparation of a Spanish "Consent to Search" form exceeded the lawful scope of the traffic stop. Finally, the appellant contends that Kohl's request to search his vehicle additionally and unreasonably expanded his detention beyond its lawful scope.

The State responds that Kohl's initial questioning of the appellant was consistent with the purpose of the traffic stop, and the appellant's responses contributed to the officer's reasonable suspicion that the appellant was transporting illegal drugs. Kohl's reasonable suspicion, in turn, justified any additional detention of the appellant occasioned by the officer's radio call to Hunter and her preparation of a Spanish "Consent to Search" form. The State does not address on appeal the appellant's complaint concerning Kohl's request to search the appellant's vehicle; however, in the trial court, the State asserted that the officer's request occurred following the conclusion of the traffic stop and during an ensuing consensual encounter.

The trial court concluded that

> the questions posed by Officer Kohl were not beyond the scope of the traffic stop. As already indicated by the Court, Officer Kohl had reasonable suspicion to believe that the defendant was intoxicated or was about to fall asleep at the wheel. She testified that the defendant explained that the reason he was tired was because he had been driving since leaving Los Angeles the previous day (this is implausible in and of itself) and had only slept briefly at a few rest stops. The conversation logically continued with a discussion concerning the defendant's destination and ownership of the vehicle. Officer Kohl's

testimony regarding the questions she asked also indicated that she was trying to determine whether the defendant was intoxicated or just tired.

In terms of the additional time it took Officer Kohl to fill out a consent to search form and request that a drug detection dog be sent to the location, the Court finds that these actions by the officer were not unreasonable under the state and federal constitutions and were supported by reasonable suspicion that the defendant was engaged in criminal activity at the time she was filling out the form and making the request. The defendant's evasiveness in answering the officer's questions regarding his destination and the ownership of the vehicle, along with the fact that the vehicle had California license plates, created rational inferences and deductions that the defendant's vehicle was possibly stolen, or that he was possibly engaged in transporting contraband. . . . While the evasiveness of the defendant's responses did not rise to the level of giving the officer probable cause to arrest or search the defendant's vehicle at that point during the stop, it did give the officer reasonable suspicion to detain the defendant long enough to fill out the consent form, request the drug detection dog and to ask the defendant for his consent to search the vehicle.

In regard to the additional questioning concerning whether there was contraband in the vehicle and whether the defendant would consent to having the vehicle searched, the Court finds that these actions were also based upon' reasonable suspicion.

. . . .

> As to the detention of the defendant in the case at bar, the Court credits Officer Kohl's testimony and finds that any extended detention of the defendant after the initial stop was based upon reasonable suspicion. Even assuming Officer Kohl did not have reasonable suspicion, the Court would find that the "extended" detention in this case was minuscule and not unreasonable under either the state or federal constitutions. . . .

We first address the legality of Kohl's inquiries concerning the appellant's destination, the ownership of his vehicle, his occupation, and his record of traffic violations and arrests. Exploring the appropriate scope of an investigative detention, our supreme court has indicated that the police may employ investigative methods unrelated to the purpose of the detention so long as the investigative methods do not prolong the detention and do not otherwise implicate federal or state constitutional provisions. *See England,* 19 S.W.3d at 767-768. That having been said, we note that courts have disagreed about whether a police officer's questioning of a motorist on a subject unrelated to the purpose of a traffic stop violates the Fourth Amendment even when the questioning does not prolong the initial, valid seizure. *Cf., e.g., United States v. Holt,* 264 F.3d 1215, 1228-1229 (10th Cir. 2001), and *United States v. Shabazz,* 993 F.2d 431, 436 (5th Cir. 1993). In any event, Officer Kohl's questioning of the appellant in this case in fact prolonged the traffic stop. Therefore, we must determine whether the questioning was related to Kohl's initial purpose of ascertaining whether the appellant was intoxicated or falling asleep.

Preliminarily, courts have held that requests for driver's licenses and vehicle registration documents,

inquiries concerning travel plans and vehicle ownership, computer checks, and the issuance of citations are investigative methods or activities consistent with the lawful scope of any traffic stop. *United States v. West,* 219 F.3d 1171, 1176 (10th Cir. 2000); *United States v. Hill,* 195 F.3d 258, 268 (6th Cir. 1999); *United States v. Lyton,* 161 F.3d 1168, 1170 (8th Cir. 1998). *But see United States v. Garcia,* 205 F.3d 1182, 1187 (9th Cir. 2000) (holding that officer's inquiries concerning driver's travel plans did not exceed the scope of traffic stop when "it was standard procedure to delay drivers for a short period of time to wait for an arrest report," the conversation did not cause any additional delay, and the conversation did not alter the subsequent chain of events). However, they have generally done so in the context of traffic stops based upon probable cause to believe that the motorist committed a traffic violation. In the context of a traffic stop based upon reasonable suspicion, at least one court has ruled that the stop must end as soon as the suspicion is dispelled and may not be prolonged even to perform the limited functions enumerated above. *United States v. McSwain,* 29 F.3d 558, 561 (10th Cir. 1994). Nevertheless, we conclude that requesting a motorist's identification and engaging him in a brief conversation by asking routine questions concerning his destination and purpose and the ownership of his vehicle may be reasonably related to ascertaining the cause of erratic or irregular driving and determining whether the motorist poses a danger to others on the road. *See, e.g., United States v. Barahona,* 990 F.2d 412, 416 (8th Cir. 1993). The difficulty in the instant case lies in Kohl's concession at the suppression hearing that, after discussing with the appellant "his length of travel" and observing him retrieve his driver's license, she was satisfied that he was not intoxicated. Moreover, at that point, she had

obtained an explanation for the appellant's weaving. While the appellant's admitted fatigue justified Kohl's further inquiry regarding his precise destination in Georgia, Kohl's subsequent inquiries concerning the ownership of the vehicle in which the appellant was driving, the appellant's occupation, and the appellant's record of traffic violations and arrests were inconsistent with the original purpose of the traffic stop.

Of course, "[a]fter [Kohl] satisfied [herself] that [the appellant] was not drunk or otherwise impaired, [she][was] justified in continuing to detain [the appellant] if, by then, [she] had reasonable and articulable suspicion that [the appellant] was engaged in other criminal activity." *United States v. Erwin,* 155 F.3d 818, 822 (6th Cir. 1998); *see also, e.g., United States v. Murillo,* 255 F.3d 1169, 1174 (9th Cir. 2001). As previously indicated, a determination of reasonable suspicion depends upon the totality of circumstances "as understood by those versed in the field of law enforcement." *Cortez,* 449 U.S. at 418, 101 S. Ct. at 695. Again, the trial court concluded that the appellant's "evasiveness in answering the officer's questions regarding his destination and the ownership of the vehicle, along with the fact that the vehicle had California license plates," afforded Kohl a reasonable suspicion that the appellant's vehicle was stolen or the appellant was transporting contraband. The State additionally notes the appellant's virtually nonstop journey from California, reflected by the litter in the appellant's vehicle. Finally, the officer noted the presence of air freshener in the appellant's vehicle.

A motorist's inability to produce proof of ownership of his vehicle or authorization to operate the vehicle may justify a reasonable suspicion of criminal activity, *United States v. Hunnicutt,* 135 F.3d 1345, 1349 (10th Cir. 1998),

including the transportation of contraband, *United States v. Arango,* 912 F.2d 441, 447 (10th Cir. 1990). Moreover, inconsistencies in information given to an officer during a traffic stop, such as the appellant's statements concerning the identity of the owner of the vehicle that he was driving, may give rise to reasonable suspicion of criminal activity. *United States v. Smith,* 263 F.3d 571, 592 (6th Cir. 2001). However, we reiterate that Kohl's questions concerning the ownership of the vehicle exceeded the lawful scope of the traffic stop.

Turning to the remaining grounds of reasonable suspicion, a motorist's lack of knowledge concerning his precise destination and a motorist's out-of-state license plate will not, without more, support an officer's reasonable suspicion of criminal activity. *United States v. Ramos,* 42 F.3d 1160, 1163 (8th Cir. 1994). As to Kohl's observation of a can of air freshener in the appellant's vehicle, we note that she only detected a slight odor of the air freshener emanating from the vehicle. Thus, notwithstanding her knowledge of the frequent use of air freshener by drug couriers to mask the odor of illegal drugs, her observation minimally strengthened her suspicion of criminal activity. *Cf., e.g., West,* 219 F.3d at 1178; *United States v. Patterson,* 65 F.3d 68, 71 (7th Cir. 1995); *United States v. Rivera,* 595 F.2d 1095, 1099 (5th Cir. 1979). Finally, unusual travel plans may support an officer's reasonable suspicion of criminal activity. *Sokolow,* 490 U.S. at 9, 109 S. Ct. at 1586-1587. In this case, the appellant's travel plans included driving virtually nonstop from California to Georgia in two days. Nevertheless, while acknowledging Officer Kohl's experience and specialized training, we must conclude that the totality of circumstances did not support a reasonable suspicion of criminal activity sufficient to

warrant expanding the scope of the traffic stop absent the appellant's responses to Kohl's questioning concerning the ownership of the vehicle. *Cf. Murillo,* 255 F.3d at 1174 (evidence of a long road trip in a short time frame in a rental car contributed along with other factors to officer's reasonable suspicion of drug-related criminal activity), and *United States v. Wood,* 106 F.3d 942, 947 (10th Cir. 1997) (the presence of fast food wrappers in a vehicle will not otherwise support an officer's reasonable suspicion of criminal activity). In so concluding, we note the United States Supreme Court's recent observation that several factors taken together may form a particularized and objective basis for a Fourth Amendment intrusion even when each individual factor alone is susceptible to innocent explanation. *United States v. Arvizu,* ___ U.S. ___, ___, 122 S. Ct. 744, ___ (2002). The factors in this case, however, formed no more than an inchoate and unparticularized hunch of criminal activity.

Accordingly, other than advising the appellant to rest prior to continuing his journey, Kohl was required to terminate the traffic stop following her inquiries concerning the appellant's destination. Instead, the detention continued until Kohl's return to the appellant of his driver's license and vehicle registration document and her issuance of a warning citation, approximately thirteen minutes following the traffic stop's inception. "When a police officer issues a traffic citation or warning and returns a driver's license and registration, a traffic stop ceases to be a seizure for purposes of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution and becomes a consensual encounter unless a driver has 'objectively reasonable' cause to believe that he or she is not free to

leave." *See State v. McCrary,* 45 S.W.3d 36, 42 (Tenn. Crim. App. 2000), *perm. to appeal denied,* (Tenn. 2001), and cases cited therein. The determination of the point at which the traffic stop ceases to be a seizure is ultimately a question of law. *Id.; see also State v. Daniel,* 12 S.W.3d 420, 423-424 (Tenn. 2000) ("[T]he trial court's conclusion that a seizure did not occur is a conclusion of law derived from an application of the law to the undisputed facts of this case.").

Our conclusion that the traffic stop terminated upon Kohl's return to the appellant of his driver's license and vehicle registration document and her issuance of a warning citation entails our resolution of the appellant's further complaint that Kohl's request for his consent to a search of his vehicle likewise exceeded the lawful scope of the traffic stop.[9] In particular, the record reflects that Kohl's request for the appellant's consent occurred following her return to the appellant of his driver's license and vehicle registration document and her issuance of a warning citation. Moreover, Kohl informed the appellant that he was free to leave prior to requesting his consent, *cf, e.g., Immigration and Naturalization Service v. Delgado,* 466 U.S. 210, 216-221, 104 S. Ct. 1758, 1762-1765 (1984), and

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[9] In this regard, we acknowledge that the State failed to address in its brief the constitutionality of Kohl's request for the appellant's consent, but "this Court should be free to examine the validity of a search [or other Fourth Amendment intrusion] using any appropriate legal analysis where the record in the case permits us to do so." *State v. James A. Hearn,* No. 01C01-9511-CR-00377, 1997 WL 537089, at *2 (Tenn. Crim. App. at Nashville, September 2, 1997) (Smith, J., concurring); *see also State v. Jose Roberto Ortiz,* No. M1998-00483-CCA-R3-CD, 1999 WL 1295988, at *7 (Tenn. Crim. App. at Nashville, December 30, 1999).

neither an officer's request for a motorist's consent to a search of his vehicle nor an officer's inquiry concerning the presence of weapons or illegal drugs in the vehicle, without more, constitutes objectively reasonable cause to believe that the motorist is not free to leave. *McCrary,* 45 S.W.3d at 43, and cases cited therein. Finally, we do not believe that the mere presence of a second patrol car transformed the encounter into a seizure, particularly as the appellant was unaware that Kohl had requested the presence of the additional officer, and Hunter and Lou remained in their patrol car until the appellant consented to a search of his vehicle. Accordingly, Kohl's request for the appellant's consent to a search of his vehicle did not implicate the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Tennessee Constitution.

iv.

Focusing next, for reasons made apparent later in this opinion, upon the consent itself and the consequent search of the appellant's vehicle, it is well settled that a search conducted pursuant to a voluntary consent is yet another exception to the requirement that searches and seizures be conducted pursuant to a warrant. *State v.. Bartram,* 925 S.W.2d 227, 230 (Tenn. 1996) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041 (1973)). In contrast to the determination of when a seizure has occurred, the determination of whether a consent to a search was voluntarily given is a question of fact to be determined from the totality of circumstances. *Schneckloth,* 412 U.S. at 227, 248-249, 93 S. Ct. at 2047-2048, 2059; *Ashworth,* 3 S.W.3d at 29. Significantly, the appellant does not dispute the trial court's finding that the

appellant's consent to the search of his vehicle was, in fact, "'unequivocal, specific, intelligently given, and uncontaminated by duress or coercion,'" *Simpson,* 968 S.W.2d at 784 (citing *State v. Brown,* 836 S.W.2d 530, 547 (Tenn. 1992)); *Ashworth,* 3 S.W.3d at 29; *see also Schneckloth,* 412 U.S. at 248-249, 93 S. Ct. at 2059, and the record does not preponderate otherwise. Rather, as noted earlier, the appellant asserts that the officers' search in this case exceeded the scope of his consent.

Initially, regardless of the precise scope of the appellant's consent, the drug-detection dog Lou signaled to the officers the presence of illegal drugs in the appellant's vehicle. "A positive indication by a properly-trained dog is sufficient to establish probable cause for the presence of a controlled substance." *United States v. Navarro-Camacho,* 186 F.3d 701, 706 (6th Cir. 1999); *see also England,* 19 S.W.3d at 768. Moreover, in *Carroll,* 267 U.S. at 149, 45 S. Ct. at 283-284, the United States Supreme Court held that an officer's probable cause to believe that an automobile contains contraband will authorize the warrantless search of the automobile. *See also Maryland v. Dyson,* 527 U.S. 465, 466-467, 119 S. Ct. 2013, 2014 (1999). Indeed, in *Carroll,* 267 U.S. at 132, 45 S. Ct. at 280, the Court concluded that probable cause supported the officers' search of the defendant's vehicle despite the officers' removal of the upholstering on the seats. In other words, application of the automobile exception to the warrant requirement authorizes even the destructive dismantlement of portions of an automobile in which contraband may be secreted. *See, e.g., California v. Acevedo,* 500 U.S. 565, 571, 111 S. Ct. 1982, 1987 (1991) (noting the Court's application of the *Carroll* doctrine to "searches of integral parts of the automobile itself"); *see also, e.g., Patterson,* 65 F.3d at 71

(noting that probable cause would authorize dismantling the "interior cover" of a truck's tailgate); *United States v. Strickland,* 902 F.2d 937, 942 (11th Cir. 1990) (noting that a search based upon probable cause may include some injury to the vehicle or items within the vehicle if the damage is reasonably necessary to gain access to a specific location where contraband is likely to be found).

That having been said, a finding of probable cause on the basis of a drug-detection dog's indication of the presence of illegal drugs should turn on the reliability of the dog, and the trial court should ensure that the dog is reliable by an appropriate finding of fact. *England,* 19 S.W.3d at 768. Factors relevant to a dog's reliability include the dog's training, the dog's "track record," with emphasis on the amount of false negatives and false positives the dog has furnished, and the officer's training and experience with this particular dog. *Id.* The trial court in this case did not directly address the issue of Lou's reliability as it did not have the benefit of our supreme court's decision in *England.* The court did, nevertheless, note Hunter's testimony concerning both his own certification as a trainer of drug-detection dogs and Lou's training in drug detection. We note, however, that, although Hunter testified that drug-detection dogs are generally trained by their handlers, he did not explicitly recount his own training and experience with Lou, nor did he testify concerning Lou's "track record." *Cf. State v. Selina G. Harrelson,* No. W1999-00521-CCA-R3-CD, 2000 WL 1051854, at *6 (Tenn. Crim. App. at Jackson, July 28, 2000), *perm. to appeal denied,* (Tenn. 2001). The Sixth Circuit Court of Appeals has observed:

> When the evidence presented, whether testimony from the dog's trainer or records of the dog's

> training, establishes that the dog is generally certified as a drug detection dog, any other evidence, including the testimony of other experts, that may detract from the reliability of the dog's performance properly goes to the "credibility" of the dog. Lack of additional evidence, such as documentation of the exact course of training, similarly would affect the dog's reliability.

United States v. Diaz, 25 F.3d 392, 394 (6th Cir. 1994). In any event, we need not evaluate the evidence of Lou's reliability as we conclude that, in fact, the officers did not unlawfully exceed the scope of the appellant's consent to search.

The trial court in this case concluded that the "search conducted by police did not exceed the consent granted by the defendant." The scope of a party's consent is measured by a standard of " 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect." *Florida v. Jimeno,* 500 U.S. 248, 251, 111 S. Ct. 1801, 1803-1804 (1991). "Objective reasonableness is a question of law that is reviewed de novo." *United States v. Rich,* 992 F.2d 502, 505 (5th Cir. 1993). *But cf. United States v. Martel-Martines,* 988 F.2d 855, 858 (8th Cir. 1993).

The understanding of a "typical reasonable person" will generally depend upon the object of the search. *Jimeno,* 500 U.S. at 251, 111 S. Ct. at 1804. Thus, in *Jimeno,* the United States Supreme Court concluded that, when an officer informs a motorist that he is searching for narcotics, it is objectively reasonable for the officer to conclude that a general consent to search the motorist's vehicle includes consent to search containers within the vehicle that might contain drugs. *Id.* More importantly,

"'courts have given broad scope to a consent to a general search of a vehicle for narcotics, interpreting the consent to include non-destructive dismantlement of parts of the vehicle, particularly when the defendant was present at the time and voiced no objection.'" *State v. Garcia,* 127 N.M. 695, 986 P.2d 491, 493-494 (N.M. App. Ct. 1999); *see also United States v. Zapata,* 180 F.3d 1237, 1243 (11th Cir. 1999) (holding that a police officer did not exceed the scope of a general consent when he removed an interior door panel of an automobile with his fingers, dislocating two plastic clips; "a search does not exceed the scope of consent merely because an officer forces open a secured compartment that reasonably may contain the objects of the search"); *United States v. Flores,* 63 F.3d 1342, 1362 (5th Cir. 1995) (holding that police did not exceed scope of general consent by removing two screws and two vent covers from the interior panels of an automobile); *United States v. Torres,* 32 F.3d 225, 231-232 (7th Cir. 1994) (indicating that general consent encompassed the removal of screws fastening a wooden compartment of a trailer); *cf. United States v. Alverez,* 235 F.3d 1086, 1088-1089 (8th Cir. 2000) (general consent to search a vehicle likely did not encompass the cutting of the spare tire), and *Martel Martines,* 988 F.2d at 858 (holding that the defendant's failure to object rendered it objectively reasonable for officers to conclude that the his general consent to a search of his truck included consent to punch a small hole in a concealed compartment).

The record in this case reflects that the appellant was aware of the object of the officer's search, namely illegal drugs. Moreover, the "Consent to Search" form signed by the appellant provided, "I . . . give my consent to Agents of the 20th Judicial District Drug Task Force, to conduct a

complete search of my entire vehicle and contents within it." The search of the officers pursuant to this consent extended to the removal of the screws from the molding covering one of the vehicle's rocker panels and the molding itself, actions unaccompanied by any objection from the appellant and constituting "non-destructive dismantlement" of a portion of the vehicle. Indeed, the appellant had previously stood by silently while the officers engaged in other "non-destructive dismantlement" of his vehicle. Accordingly, we cannot conclude that the removal of the screws and the molding was outside the scope of the appellant's general consent. Having removed the screws and molding, the officers could insert a probe into the pre-existing screw holes, thereby discovering the presence of a foreign object inside the normally hollow rocker panel and, particularly in combination with the drug-detection dog's positive indication of the presence of illegal drugs, establishing the probable cause necessary to extend the search beyond the scope of the appellant's consent.

V.

Finally, we address an issue largely neglected by both parties in this appeal, namely whether the exclusionary rule requires the suppression of the methamphetamine seized by police in the instant case. *State v. James A. Hearn,* No. 01C01-9511-CR-00377, 1997 WL 537089, at *2 (Tenn. Crim. App. at Nashville, September 2, 1997) (Smith, J., concurring); *see also State v. Jose Roberto Ortiz,* No. M1998-00483-CCA-R3-CD, 1999 WL 1295988, at *7 (Tenn. Crim. App. at Nashville, December 30, 1999), *perm. to appeal denied,* (Tenn. 2000). Although we have concluded that Kohl's traffic stop of the appellant violated the Fourth Amendment to the United States Constitution and Article

I, Section 7 of the Tennessee Constitution both at its inception and in its scope, the United States Supreme Court has observed, "The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by the police conduct." *Illinois v. Gates,* 462 U.S. 213, 223, 103 S. Ct. 2317, 2324 (1983); *see also, e.g., Daniel,* 12 S.W.3d at 428.

In *Wong Sun v. United States,* 371 U.S. 471, 484, 83 S. Ct. 407, 416 (1963), the Supreme Court broadly observed that the exclusionary rule operates to bar the admissibility of evidence obtained both directly and derivatively from an unlawful invasion of an individual's privacy or personal security. However, the Court declined to hold that "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Id.* at 487-488, 417. Instead, the court held that, in determining whether physical or verbal evidence is the fruit of a prior illegality, the "apt question . . . is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* at 488, 417. Thus, a consent to a search that is preceded by an unlawful seizure may nevertheless validate the search if the consent is both (1) voluntary, *Simpson,* 968 S.W.2d at 784; *Schneckloth,* 412 U.S. at 248-249, 93 S. Ct. at 2059; and (2) "sufficiently an act of free will to purge the primary taint of the unlawful invasion," *Wong Sun,* 371 U.S. at 486, 83 S. Ct. at 416-417; *cf. Brown v. Illinois,* 422 U.S. 590, 602, 95 S. Ct. 2254, 2261 (1975); *United States v. Peters,* 10 F.3d 1517, 1534

(10th Cir. 1993); *see also United States v. Chavez-Villareal,* 3 F.3d 124, 127-128 (5th Cir. 1993); *United States v. Richardson,* 949 F.2d 851, 858 (6th Cir. 1991). "The first prong focuses on coercion, the second on the causal connection with the constitutional violation." *Chavez-Villareal,* 3 F.3d at 127.

As previously noted, the appellant consented to a search of his vehicle following the conclusion of the unlawful traffic stop in this case. Once again, the trial court found and it is undisputed that the appellant's consent was voluntary. Of course, due to its determination that Kohl's traffic stop of the appellant comported with the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution, the trial court did not address the issue of attenuation. Nevertheless, the issue of attenuation is one that this court reviews de novo, *State v. Ford,* 30 S.W.3d 378, 380 (Tenn. Crim. App. 2000), and the record before this court is adequate for purposes of our review.

To determine whether the causal connection between an illegal seizure and a consent to search has been broken, a court should consider the following factors set forth by the United States Supreme Court in *Brown,* 422 U.S. at 603-604, 95 S. Ct. at 2261-2262: (1) the temporal proximity of the illegal seizure and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. The State carries the burden of establishing sufficient attenuation. *Id.* at 604, 2262.

We acknowledge that the appellant consented to a search of his vehicle within minutes of the conclusion of the traffic stop in this case. Moreover, any reasonable

suspicion arising during an unlawful traffic stop will not attenuate the connection between the seizure and a subsequent consent to a search. *United States v. Ward,* 961 F.2d 1526, 1534-1535 (10th Cir. 1992), *overruled on other grounds by United States v. Little,* 18 F.3d 1499, 1506 (10th Cir. 1994); *cf. United States v. Sprinkle,* 106 F.3d 613, 619 (4th Cir. 1997); *State v. Robert Lee Mallard,* No. M2000-00351-R3-CD, 2001 WL 178461, at **4-5 (Tenn. Crim. App. at Nashville, February 23, 2001). Conversely, as already noted, Kohl did not require reasonable suspicion of criminal activity in order to request the appellant's consent to search his vehicle, and Kohl did not use knowledge acquired during the unlawful traffic stop to elicit a consent from the appellant. *Cf. United States v. Hearn,* 496 F.2d 236, 241-244 (6th Cir. 1974). In fact, Kohl's preparation of a Spanish "Consent to Search" form during the appellant's detention was intended to ensure that any subsequent consent was an independent act of free will. Correspondingly, although Kohl radioed Officer Hunter during the appellant's detention, she did not inform the appellant that she had requested Hunter's and Lou's presence, nor did she indicate any intention to seek their assistance until and unless the appellant consented to a search of his vehicle. In other words, she did not obtain the appellant's consent by exploiting the fruit of the unlawful detention. Indeed, examples of circumstances sufficient to create a discontinuity between an illegal traffic stop and a consent to search include the officer's communication to the driver that he is free to leave prior to requesting consent to search and her advice to the driver of his right to refuse consent. *United States v. Ramstad,* 120 F.Supp.2d 973, 980 (D. Kan. 2000); *see also United States v. Fernandez,* 18 F.3d 874, 882 (10th Cir. 1994); *United States v. Ramos,* 42 F.3d 1160, 1163-1164 (8th Cir. 1994);

Bretti v. Wainwright, 439 F.2d 1042, 1045-1046 (5th Cir. 1971). The record in this case reflects both of the above circumstances. In particular, we note that, notwithstanding the language barrier between Kohl and the appellant, the appellant emphasized at trial that he understood that he was free to leave and that he was free to refuse consent to the search. Finally, contrary to the appellant's assertions in his brief, we do not believe that the official misconduct in this case, i.e., the traffic stop, was either flagrant or characterized by "a quality of purposefulness." *Brown,* 422 U.S. at 605, 95 S. Ct. at 2262.

Whether Kohl's misconduct was flagrant or purposeful is particularly important to our attenuation analysis in light of the deterrent purposes of the exclusionary rule. As one noted authority has observed, "the underlying purpose of the 'attenuated connection' test is to mark 'the point of diminishing returns of the deterrence principle.'" WAYNE R. LAFAVE, 5 SEARCH AND SEIZURE, § 11.4(a), at 235 (3d ed.1996). That the impropriety of the seizure in this case was not obvious and that the point of diminishing returns was reached is apparent from the trial court's agreement with Kohl that the appellant's driving "was clearly characteristic of a driver who was either intoxicated or about to fall asleep at the wheel," and is illustrated by the legitimate disagreements between judges and courts in *Binette,* No. 03C01-9802-CR-00075, 1999 WL 427606, at **1-2, and *Binette,* 33 S.W.3d at 220-222, concerning the degree of weaving within a lane that will support an officer's reasonable suspicion of the driver's intoxication. *Cf. Chavez-Villareal,* 3 F.3d at 128 ("[T]he required indicia of individualized suspicion were so utterly lacking herein that only suppression will serve the deterrence function of the exclusionary rule."). Similarly, while the scope of the

traffic stop exceeded its justification, the lack of reasonable suspicion justifying the officer's expansion of that scope was not indisputable, and, the thirteen-minute detention did not otherwise amount to an instance of "flagrant" misconduct. Also, we do not believe that Kohl's status as a member of the Highway Interdiction Unit alone preponderates against the trial court's manifest accreditation of her testimony concerning the purpose of the traffic stop. In this regard, we emphasize that there is no evidence before this court of the pattern of abuse of authority that so concerned Circuit Judge Clay in his concurring opinion in *United States v. Freeman,* 209 F.3d 464, 467-472 (6th Cir. 2000).

In sum, we conclude that the appellant's consent to the search of his vehicle and the officers' consequent discovery of 40.1 pounds of methamphetamine were not the fruit of Kohl's unlawful traffic stop of the appellant. Therefore, we cannot say that the trial court erred in denying the appellant's motion to suppress with respect to the methamphetamine seized from the appellant's vehicle. We note, however, that the trial court should have suppressed at trial Kohl's testimony concerning her observations during the unlawful detention and until her return to the appellant of his driver's license and vehicle registration document and her issuance of a warning citation. Because we are reversing the appellant's conviction on other grounds and remanding this case for a new trial, the court below should limit Kohl's testimony accordingly.

B. Testimony by Officer Daniel Rosales

The appellant next challenges the trial court's admission at trial of the testimony of Officer Rosales that

criminal organizations dealing in illegal drugs select only trusted individuals to transport their goods and that such organizations calculate the courier's fee according to the amount of illegal drugs transported. The appellant grounds his complaint upon the following two arguments: (1) the State failed to timely notify him of its intention to call Rosales as a witness, thereby violating Tenn. R. Crim. P. 12; and (2) Rosales' testimony was inadmissible pursuant to Tenn. R. Evid. 702 and 403.

The State responds that "there [was] no prolonged delay between the State's decision to call [Rosales as a witness] and the defendant's receipt of notification." Moreover, the State argues that the exclusion of Rosales' testimony was not the appropriate remedy for any delay as the remedy of a continuance was available to the appellant. Finally, the State asserts that "Officer Rosales' testimony substantially assisted the trier of fact in this case in that it established that the car contained nearly two million dollars of methamphetamine, that drug couriers were paid by the amount being transported, and that drug dealers did not cavalierly relinquish control of such expensive merchandise."

i.

The record reflects that the appellant filed a motion for discovery on October 19, 1999. Among other items, he requested "[t]he correct names and current addresses of any witness the State intends to use in its case in chief and particularly those whose names are not endorsed on the Indictment." The appellant cited Tenn. Code Ann. § 40-17-106 (1997) in support of his request. The prosecutor filed a response on October 28, 1999, but did not name any

additional witnesses. Rather, he stated, "Defense counsel may assume that any specific request which is not answered is either not discoverable or the information requested is not available."

On May 8, 2000, one week before the appellant's trial, the prosecutor sent to defense counsel a letter notifying him that, "[a]s I had advised you earlier," the State would be calling Officer Daniel A. Rosales to testify as an expert witness. The letter arrived in defense counsel's office on May 9 and contained a brief description of Rosales' proposed testimony. On May 10, 2000, defense counsel filed a motion in limine asking that the trial court order the prosecutor to refrain at trial from referring to Rosales' testimony pending a hearing to determine its admissibility.

On May 16, 2000, the second day of the appellant's trial, the trial court conducted a jury-out hearing to address the admissibility of Rosales' testimony. During the jury-out hearing, Rosales indicated that he had been contacted by a DEA agent concerning the appellant's case approximately two or three weeks prior to trial and had first spoken with the prosecutor approximately one and one-half weeks prior to trial.[10] Moreover, Rosales communicated to the trial court the substance of his proposed testimony. In addition to the testimony summarized earlier in this opinion, Rosales indicated that he would

[10] Similarly, Rosales later testified before the jury that he had first spoken with the prosecutor at most one and one-half or two weeks prior to trial, but he was unsure of the precise time.

testify that he had never encountered a drug courier who was unaware that he was transporting contraband.

The parties' arguments before the trial court were substantially similar to their positions in this appeal. We additionally note defense counsel's explanation to the trial court for his failure to request a continuance due to the timing of the State's notice concerning Rosales' testimony. Specifically, defense counsel asserted, "My client has been sitting in jail since May 9th. His family flew in from Los Angeles."

The trial court concluded that defense counsel had waived any objection to the timing of the State's notice by proceeding to trial without requesting a continuance. Moreover, the court ruled that Rosales could testify as an expert in the field of "drug operations, modus operandi," observing,

> [T]he main issue is . . . is the probative value [of Rosales' testimony] outweighed by the prejudicial effect to Mr. Garcia? And, I think to some degree it is; that is, to the issues about . . . Officer Rosales's . . . the proffered testimony of Officer Rosales gave about he's never interviewed anyone that did not know that they were transporting drugs, crosses the line in terms of becoming speculative in the Court's opinion.
>
> But I do think his proffer concerning the drug organizations, the hierarchy of drug organizations, mules, transporters, whatever you want to call them, the fact that they're trusted and paid for transportation – for transporting illegal substances, and the reasons why he would think that they would know are areas that would substantially assist this jury in determining an issue in this case; that, is, did Mr. Garcia knowingly

> possess this? Now, [Rosales has] already said, and General Zimmermann said, that he does not have any information about Mr. Gar[ci]a in particular; but, that in and of itself does not make it inadmissible. I mean, he can in general . . . as I've stated, describe the reasons why a transporter would know without . . . eliciting – the State eliciting through him that no one he's ever interviewed did not know. I mean, I think the areas about the value of the substance . . . and, it goes to the weight in terms of whether that's Houston or LA or Nashville or Georgia. Uh – but, the value – uh – as I've already stated, the hierarchy, in general, and using people that they trust . . . and getting paid . . . and, that – that general testimony about what a mule does [are admissible].

ii.

We first address the appellant's complaint concerning the timing of the State's notice to defense counsel that Rosales would testify at the appellant's trial. The appellant apparently relies wholly upon Tenn. R. Crim. P. 12(d), which provides:

Notice by the State of Intention to Use Evidence:

> (1) At the Discretion of the State. – At the arraignment or as soon thereafter as is practicable, the state may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.
>
> (2) At the Request of the Defendant. – At the arraignment or as soon thereafter as is practicable,

> the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the state's intention to use . . . any evidence which the defendant may be entitled to discover under Rule 16 . . . .

Notwithstanding the appellant's reliance upon the above rule, we note our supreme court's observation in *State v. Cook,* 9 S.W.3d 98, 101 (Tenn. 1999) (quoting *United States v. Barletta,* 644 F.2d 50, 54 (1st Cir. 1981)), that " '[a]t least as used in 12(b), . . . [m]otions to suppress are . . . "objections to evidence on the ground that it was illegally obtained", including "evidence obtained as a result of an illegal search" and "other forms of illegality such as the use of unconstitutional means to obtain a confession." ' " Accordingly, because Rosales' testimony did not comprise illegally obtained evidence, Tenn. R. Crim. P. 12(d) is irrelevant to the resolution of this issue. Moreover, assuming the applicability of Tenn. R. Crim. P. 12(d), Tenn. R. Crim. P. 16 does not authorize pretrial discovery of the names and addresses of State's witnesses. *State v. Harris,* 839 S.W.2d 54, 69 (Tenn. 1992); *State v. Martin,* 634 S.W.2d 639, 643 (Tenn. Crim. App. 1982); *State v. Jimmy Clyde Jones,* No. 02C01-9703-CC-00120, 1997 WL 777077, at *8 (Tenn. Crim. App. at Jackson, December 18, 1997).

Rather, the pertinent authority is Tenn. Code Ann. § 40-17-106, which statute the appellant relied upon in the trial court but largely and inexplicably ignores on appeal, thereby waiving any reliance thereon. Tenn. R. App. P. 27(a)(7); Tenn. Ct. of Crim. App. Rule 10(b). Notwithstanding waiver, the appellant is not entitled to relief under Tenn. Code Ann. § 40-17-106. That statute provides that "[i]t is the duty of the district attorney general to endorse

on each indictment or presentment, at the term at which the same is found, the names of such witnesses as the district attorney general intends shall be summoned in the cause." *Id.* The statute is directory rather than mandatory and does not necessarily disqualify from testifying a witness whose name has been omitted from the indictment. *Harris,* 839 S.W.2d at 69. Rather, our supreme court has indicated that a defendant is not entitled to relief absent a showing of prejudice, bad faith, or undue advantage. *Id.; see also State v. Allen,* 976 S.W.2d 661, 667 (Tenn. Crim. App. 1997); *State v. Kendricks,* 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996); *State v. Joel Guilds,* No. 01C01-9804-CC-00182, 1999 WL 333368, at *3 (Tenn. Crim. App. at Nashville, May 27, 1999). Specifically with respect to prejudice, "'it is not the prejudice which resulted from the witness' testimony but the prejudice which resulted from the defendant's lack of notice which is relevant.'" *Kendricks,* 947 S.W.2d at 883. The determination of whether a witness omitted from the indictment should testify lies within the sound discretion of the trial court. *Allen,* 976 S.W.2d at 667; *Kendricks,* 947 S.W.2d at 883.

We cannot conclude that the trial court abused its discretion in the instant case. As noted by the State, the appellant was aware for at least six days prior to trial that Rosales intended to testify. Moreover, nothing in the record disputes the prosecutor's reference in his May 4, 1999 letter to a prior discussion with defense counsel concerning Rosales' testimony. Significantly, the appellant has failed to state what more he could or would have done if he had been provided Rosales' name at an earlier date, and he therefore demonstrates neither any prejudice suffered by himself nor any undue advantage enjoyed by

the State. *See, e.g., State v. Hutchison,* 898 S.W.2d 161, 170-171 (Tenn. 1994). We also agree with the State that the appellant's failure to request a continuance must be weighed in the balance against the exclusion of Rosales' testimony. *See, e.g., Allen,* 976 S.W.2d at 667. In this regard, we disagree with the appellant that "it is beyond belief" that the prosecutor did not decide to use Rosales' testimony well before issuing the appellant notice. Both the trial court and the parties remarked upon the unusual nature of Rosales' testimony. It is certainly possible that the idea to call Rosales as a witness was the result of brainstorming occurring in the final weeks prior to trial and required some degree of reflection prior to approval. In short, the appellant has simply failed to carry his burden of demonstrating his entitlement to relief. In any event, the appellant's true complaint lies with the content of Rosales' testimony, an issue we now turn to address.

iii.

In *State v. Coley,* 32 S.W.3d 831, 834 (Tenn. 2000), our supreme court observed that the following principles guide a trial court's determination of whether to admit expert testimony relating to scientific, technical, or other specialized knowledge:

> First, the evidence must be relevant to a fact at issue in the case. Tenn. R. Evid. 401, 402. Second, the expert must be qualified by specialized knowledge, skill, experience, training, or education in the field of expertise, and the testimony in question must substantially assist the trier of fact to understand the evidence or determine a fact in issue. Tenn. R. Evid. 702; [*McDaniel v. CSX Transp., Inc.,* 955 S.W.2d 257, 265 (Tenn.

> 1997)]; *State v. Begley,* 956 S.W.2d 471, 475 (Tenn. 1997). Finally, when the expert witness offers an opinion or states an inference, the underlying facts or data upon which the expert relied must be trustworthy. Tenn. R. Evid. 703; *McDaniel,* 955 S.W.2d at 265.

The admissibility of expert testimony rests within the sound discretion of the trial court. *Coley,* 32 S.W.2d at 833; *see also State v. William R. Stevens,* No. M1999-02067-CCA-R3-DD, 2001 WL 579054, at *15 (Tenn. Crim. App. at Nashville, May 30, 2001).

On appeal, the appellant challenges neither Rosales' qualification as an expert nor the trustworthiness of the underlying facts or data upon which he relied. Rather, the appellant simply asserts that Rosales' testimony was irrelevant and, rather than substantially assisting the trier of fact to understand the evidence or determine a fact in issue, posed a significant danger of unfair prejudice. For purposes of clarity, we also emphasize that the challenged testimony does not appear to encompass Rosales' testimony concerning the street value of the methamphetamine, nor would the appellant prevail on that basis. *See, e.g., State v. Matthews,* 805 S.W.2d 776, 782 (Tenn. Crim. App. 1990). Instead, the challenged testimony comprises Rosales' testimony concerning the practices of criminal organizations dealing in illegal drugs.

In support of his challenge, the appellant seeks to analogize Rosales' testimony to expert testimony concerning the reliability of eyewitness testimony. Our supreme court addressed the admissibility of the latter in *Coley,* 32 S.W.3d at 833-838. The court concluded that "general and unparticularized expert testimony concerning the reliability of eyewitness testimony, which is not specific to the

witness whose testimony is in question, does not substantially assist the trier of fact." *Id.* at 838. The court based its decision on the following rationales: (1) expert testimony concerning eyewitness identification simply offers generalities and is not specific to the witness whose testimony is in question; (2) the subject of the reliability of eyewitness identification is within the common understanding of reasonable persons; and (3) such testimony may mislead and confuse the jury, resulting in the jury's abandonment of its responsibility as fact-finder and its adoption of the judgment of the expert. *Id.* at 837-838.[11]

We agree with the appellant that our supreme court's decision in *Coley* has some bearing upon the instant case. Like the expert testimony at issue in *Coley,* Rosales' testimony concerning the care with which organizations

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[11] Other Tennessee cases that are closely analogous to *Coley* include the following: In *State v. Ballard,* 855 S.W.2d 557, 561-562 (Tenn. 1993), the supreme court held that expert testimony concerning the profile of a sexually abused child was inadmissible for the purpose of proving that the victim had in fact been sexually abused. More recently, in *State v. Smith,* 42 S.W.3d 101, 110-112 (Tenn. Crim. App. 2000), *perm. to appeal denied,* (Tenn. 2001), this court held that expert testimony concerning the general behavior of other criminal suspects during questioning by police had no value in assessing the credibility of the defendant's statements to the police. Similarly, in *Stevens,* No. M1999-02067-CCA-R3-DD, 2001 WL 579054, at *20, this court held that the State could not establish that the motive of the perpetrator was "sexual assault brought about by a precipitating stressor" by introducing expert testimony comparing the crime scene at issue to the "typical crime scene" in which "sexual assault brought about by a precipitating stressor" was the motivation. *See also State v. Ashburn,* 914 S.W.2d 108, 111-113 (Tenn. Crim. App. 1995). *But cf. State v. William Aubrey Trotter,* No. 01C01-9701-CR-00019, 1998 WL 75423, at *4 (Tenn. Crim. App. at Nashville, February 24, 1998), and *id.* at * 5 (Tipton, J., concurring).

dealing in illegal drugs select their drug couriers and the method by which the courier's fee is calculated was of a general nature and was not specific to this case. Indeed, the connection between the expert testimony and the case at hand is more attenuated than that in *Coley* as, even assuming Rosales' generalizations concerning criminal organizations can be applied with confidence to any one organization, the State did not introduce evidence, nor bring any charges, concerning the appellant's participation in such an organization. *Cf. State v. Michael F. Marasciello,* No. M1997-00049-CCA-R10-CD, 2000 WL 1130126, at **19-20 (Tenn. Crim. App. at Nashville, July 28, 2000), *perm. to appeal denied,* (Tenn. 2000) (publication pending). Accordingly, contrary to the State's position on appeal, whether such organizations would entrust large quantities of illegal drugs to an unwitting courier does not make the appellant's knowledge of the methamphetamine any more or less probable. Tenn. R. Evid. 401. In short, the testimony was irrelevant. *Cf. United States v. Cordoba,* 104 F.3d 225, 229-230 (9th Cir. 1997). Moreover, even assuming the appellant's participation in a criminal organization, we are not convinced that the jury required the testimony of an expert to conclude that such an organization would not entrust 1.8 million dollars worth of methamphetamine to an unwitting courier. Finally, notwithstanding the disputed testimony's lack of probative value and defense counsel's efforts on cross-examination to clarify Rosales' lack of any knowledge specifically pertaining to the appellant, the testimony created a danger of unfair prejudice, confusion of the issues, or misleading the jury as it unavoidably left the jury with the impression that the appellant was a member of a large-scale criminal organization. Tenn. R. Evid. 403.

While we would not characterize the State's case against the appellant as insubstantial, the credibility of the appellant or lack thereof was undoubtedly a critical component of the jury's resolution in favor of the State. Particularly in the context of Kohl's inadmissible testimony concerning the appellant's statements during his illegal detention, we cannot conclude with confidence that the introduction of Rosales' testimony did not affect the judgment. Tenn. R. Crim. P. 52(a); *see also* Tenn. R. App. P. 36(b). Accordingly, we must reverse the appellant's conviction and remand this case for a new trial.

C. Denial of Motion for Judgment of Acquittal

The appellant next asserts that the trial court erred in denying his motion for judgment of acquittal under Tenn. R. Crim. P. 29(C). When a trial court is presented with a motion for a judgment of acquittal, the court's sole concern is the legal sufficiency, as opposed to the weight, of the evidence. *State v. Blanton,* 926 S.W.2d 953, 957 (Tenn. Crim. App. 1996); *State v. Eric Terrell Glover,* No. W2000-01278-CCA-R3-CD, 2001 WL 1078279, at *5 (Tenn. Crim. App. at Jackson, September 14, 2001). Of course, when a motion for judgment of acquittal is a component of a motion for new trial, Tenn. R. Crim. P. 33(f) authorizes the trial court to grant a new trial if it disagrees with the jury about the weight of the evidence. The accuracy of a trial court's "thirteenth juror" determination, however, is not subject to appellate review. *State v. Moats,* 906 S.W.2d 431, 435 (Tenn. 1995). In other words, once the trial court approves the jury's verdict as the thirteenth juror, appellate review is limited to the legal sufficiency of the evidence; that is, whether any "rational trier of fact" could

have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn. 1982); Tenn. R. App. P. 13(e).

The standard of legal sufficiency is predicated upon the principle that all factual issues raised by the evidence, including questions concerning the credibility of witnesses and the weight and value to be given the evidence, are resolved by the trier of fact. *State v. Pruett,* 788 S.W.2d 559, 561 (Tenn. 1990). Consequently, on appeal, we afford the State as the prevailing party the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Williams,* 657 S.W.2d 405, 410 (Tenn. 1983). This standard applies to convictions based upon direct evidence, circumstantial evidence, or both. *State v. Carruthers,* 35 S.W.3d 516, 557 (Tenn. 2000). Thus, as in the case of direct evidence, the weight to be given circumstantial evidence and " '[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" *Marable v. State,* 203 Tenn. 440, 313 S.W.2d 451, 457 (Tenn. 1958).

The State in this case was required to prove beyond a reasonable doubt that the appellant knowingly possessed methamphetamine with intent to deliver and that the methamphetamine weighed one thousand grams or more. Tenn. Code Ann. § 39-17-417(a)(4) and (j)(10) (1997). The legislature has defined the term "deliver" or "delivery" as "the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." Tenn. Code Ann. § 39-17-402(6) (1997). Moreover, in *State v. Transou,* 928 S.W.2d

949, 955-956 (Tenn. Crim. App. 1996) (citations omitted), this court elaborated upon the meaning of the term "possession" used in Tenn. Code Ann. § 39-17-417:

> "The term possession . . . embraces both actual and constructive possession. Before a person can be found to constructively possess a drug, it must appear that the person has 'the power and intention at a given time to exercise dominion and control over . . . [the drugs] either directly or through others.' In other words, 'constructive possession is the ability to reduce an object to actual possession.' . . .

See also State v. Ross, 49 S.W.3d 833, 845-846 (Tenn. 2001).

The State may prove a criminal offense by the use of circumstantial evidence alone. *State v. Tharpe,* 726 S.W.2d 896, 899-900 (Tenn. 1987); *State v. Knight,* 969 S.W.2d 939, 941 (Tenn. Crim. App. 1997). However, before a jury may convict a defendant of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford,* 470 S.W.2d 610, 612 (Tenn. 1971); *see also State v. Gregory,* 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993). "In summary, a conviction for a criminal offense cannot be predicated solely upon conjecture, guess, speculation, or a mere possibility that [the accused] may be guilty." *Transou,* 928 S.W.2d at 955.

Thus, this court has held that the mere presence of an accused in an area where drugs are discovered or mere association with a person who does in fact control the drugs or property where the drugs are discovered is not,

alone, sufficient to support a finding that the accused constructively possessed the drugs. *Id.* at 956. However, a defendant's ownership *or control over* a vehicle in which the contraband is secreted will support a finding of constructive possession and, hence, knowing possession. *Ross,* 49 S.W.3d at 846; *State v. Brown,* 915 S.W.2d 3, 7-8 (Tenn. Crim. App. 1995); *State v. Johnny Bernard Jones,* No. 02C01-9801-CC-00026, 1998 WL 886567, *2 (Tenn. Crim. App. at Jackson, December 21, 1998). Moreover, a defendant's knowledge of the drugs may be inferred from the large quantity or value of the drugs. *See, e.g., United States v. Ocampo,* 937 F.2d 485, 488 (9th Cir. 1991). Similarly, Tenn. Code Ann. § 39-17-419 (1997) provides that "[i]t may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance . . . w[as] possessed with the purpose of selling or otherwise dispensing."

Again, the appellant in this case was the driver and sole occupant of a vehicle in which approximately eighteen thousand grams of methamphetamine were secreted. According to the appellant, a "friend" had loaned him the vehicle approximately three days prior to his arrest because the friend was going to Mexico on vacation for one month. The appellant acknowledged that he had exclusive possession of the vehicle. He also acknowledged that his friend was aware of his planned trip to Georgia to visit his cousin and, moreover, knew his cousin. However, the appellant denied that his friend instructed him to take the car to Georgia and denied any awareness of the drugs in the car. Nevertheless, during his consensual encounter with Officer Kohl following the traffic stop, the appellant displayed nervousness only when questioned concerning

the possible presence of illegal drugs in the vehicle. Additionally, expert testimony established that, in some markets, the methamphetamine found in the vehicle was worth approximately 1.8 million dollars. A reasonable jury could have concluded that it was utterly implausible that a drug smuggler would entrust the appellant with a vehicle containing 1.8 million dollars worth of methamphetamine for one month without informing the appellant of its contents and without any instructions concerning the appellant's use of the vehicle, in the vague hope that the appellant would either successfully convey the drugs to the appropriate destination or otherwise hold the drugs in safety until the owner's return. This issue is without merit.

D. Jury Instructions

Finally, the appellant complains concerning the trial court's rejection of his proposed jury instruction on the lesser-included offense of criminal responsibility for facilitation of a felony and his proposed instruction that a defendant's mere association with a person who does in fact control the drugs or property where the drugs are discovered is insufficient to establish the defendant's constructive possession of the drugs. With respect to the facilitation instruction, the appellant asserts that, pursuant to *State v. Burns,* 6 S.W.3d 453, 467 (Tenn. 1999), facilitation is "clearly" a lesser-included offense of the charged offense, and the instruction was warranted by the State's theory at trial that the appellant was a drug courier working on behalf of a criminal organization. With respect to the instruction on "mere association," the appellant relies upon *Transou,* 928 S.W.2d at 956, and asserts that the instruction was warranted in light of

undisputed evidence that the appellant did not own the vehicle in which the methamphetamine was discovered.

The State responds that the trial court properly refused to instruct the jury on facilitation because, "[t]o be guilty of facilitation, the defendant would have to know the drugs were in the car. If he knew the drugs were in the car and he drove the car, then he transported the drugs and is guilty of the charged offense." As to the proposed instruction on mere association, the State asserts that the substance of the instruction was inherent in the court's instruction on constructive possession.

i.

We agree with the appellant that facilitation is a lesser-included offense of possession of a controlled substance with intent to deliver. *Burns,* 6 S.W.3d at 467; *see also State v. Ely,* 48 S.W.3d 710, 720 (Tenn. 2001) (noting that, although defendant was not specifically charged with criminal responsibility for the conduct of another, "part (c) of the *Burns* test expressly states that facilitation of the charged offense is a lesser-included offense of the charged offense"), *cert. denied,* ___ U.S. ___, 122 S. Ct. 408 (2001). Accordingly, the trial court was obligated to instruct the jury on facilitation if there existed evidence that reasonable minds could accept as to the lesser-included offense and this evidence was legally sufficient to support a conviction of the lesser-included offense. *Burns,* 6 S.W.3d at 469. Significantly, "[w]hether sufficient evidence supports a conviction of the charged offense does not affect the trial court's duty to instruct on the lesser offense if evidence also supports a finding of guilt on the lesser offense." *Id.* at 472; *see also State v. Bowles,* 52 S.W.3d 69, 80

(Tenn. 2001). *But cf. State v. Doney D. Miles,* No. W2000-02587-CCA-R3-CD, 2001 WL 1078281, at **4-5 (Tenn. Crim. App. at Jackson, September 14, 2001). In determining whether the evidence warranted an instruction on facilitation, the court was required to "view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence." *Burns,* 6 S.W.3d at 469.

"A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under Tenn. Code Ann. § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403(a) (1997). Thus, facilitation requires the absence of any "intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense." Tenn. Code Ann. § 39-11-402(2) (1997).

We must agree with the State that there is no evidence in the record that the appellant was criminally responsible for facilitating the commission of the charged offense by another. Again, the appellant was charged with possession of methamphetamine with intent to deliver. Arguably, as the appellant was the driver and sole occupant of the vehicle transporting the drugs to Georgia, there was no one to whom he could furnish substantial assistance in committing the offense of felony possession of a controlled substance. However, we note that a person may exercise constructive possession through another. *Transou,* 928 S.W.2d at 955-956. At least in the context of possession of stolen property, we have observed that a person

> "'has such constructive possession where the goods are in the possession of someone over whom he has for the time being direction and control, such as his authorized servants or agents, . . . so that the goods will be forthcoming when he orders, and also where by his direction the goods are deposited in a place subject to his control, or where they are concealed on his premises by others with his knowledge or consent.'"

Sullivan v. State, 513 S.W.2d 152, 154 (Tenn. Crim. App. 1974). Nevertheless, assuming that the owner of the vehicle or someone other than the appellant had constructive possession of the drugs through the appellant, that the appellant was aware of the person's intent to deliver the drugs, and that the appellant furnished substantial assistance in the commission of the offense, no reasonable juror could have believed that the appellant did not intend "to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense." Tenn. Code Ann. § 39-11-402(2). Indeed, assuming the appellant's knowledge of the drugs, the appellant possessed no other reason for using the vehicle in question in order to drive to Georgia other than to assist in the commission of the offense or, at a minimum, benefit from the "results of the offense" by virtue of avoiding the use of his own vehicle for the lengthy trip. Accordingly, no instruction on the lesser-included offense of facilitation was warranted. *See, e.g., Ely,* 48 S.W.3d at 724.

ii.

As to the appellant's proposed instruction on "mere association," a defendant has a "constitutional right to a correct and complete charge of the law." *State v. Teel,* 793

S.W.2d 236, 249 (Tenn. 1990). Accordingly, trial courts "should give a requested instruction if it is supported by the evidence, embodies a party's theory, and is a correct statement of the law." *State v. Phipps,* 883 S.W.2d 138, 150 n.20 (Tenn. Crim. App. 1994). However, trial courts need not give requested instructions if the substance of the instructions is covered in the general charge. *State v. Zirkle,* 910 S.W.2d 874, 892 (Tenn. Crim. App. 1995). We must agree with the State that "the substance of the requested instruction is inherent in the court's instruction that constructive possession requires that the defendant have both the power and intention to exercise control over an object" and in the court's instruction on circumstantial evidence. *State v. Johnny Wayne Tillery,* No. 01C01-9506-CC-00182, 1998 WL 148326, at *1 (Tenn. Crim. App. at Nashville, March 30, 1998); *State v. Milton Jerome Johnson,* No. 139, 1991 WL 35752, at *2 (Tenn. Crim. App. at Jackson, March 20, 1991).

III. Conclusion

For the foregoing reasons, we reverse the judgment of the trial court and remand this case for a new trial.

/s/ Norma McGee Ogle
NORMA McGEE OGLE, JUDGE

John Everett Williams, J., dissenting.

After careful review of the record, I write separately because I reach a different conclusion than that expressed in the majority opinion with respect to the defendant's motion to suppress the evidence obtained during the

search of his vehicle. I agree with the majority on all other matters raised in this appeal.

I conclude that the defendant's motion to suppress the evidence seized from the rocker panels of the vehicle should have been granted. The majority acknowledges the initial stop of this defendant was without reasonable suspicion and therefore, unlawful. In addition, I conclude the detention that followed was unreasonable for a number of reasons, any one of which was sufficient to render the continued detention unlawful. Furthermore, because the defendant's consent was so closely associated with the unlawful stop and detention, the taint of the unlawful stop and detention were not sufficiently removed to render the consent sufficiently an act of free will. For the foregone reasons, I would reverse the trial court's denial of the defendant's motion to suppress the evidence obtained during the search of his vehicle.

I re-emphasize, as the majority correctly points out, that the initial stop of this defendant was without reasonable suspicion to believe that the defendant was in violation of any law. It is clear from Officer Kohl's testimony and the video tape that the defendant's vehicle wove slowly from one side of the lane to the other and back again on at least two occasions. As was the majority, I am guided by our supreme court's holding in *Binette* that the weaving of an automobile within its own lane, which is neither "pronounced" nor "exaggerated," does not afford an officer reasonable suspicion of the driver's intoxication. *State v. Binette,* 33 S.W.3d 215, 220 (Tenn. 2000). Because the defendant's movement within his own lane of traffic was not pronounced or exaggerated, there was no reasonable basis for Officer Kohl to stop the defendant.

The initial illegal seizure was compounded by the continued illegal detention of the defendant. First, the continued detention of the defendant after the officer's initial brief encounter and conversation with him was unreasonable. When assessing the reasonableness of a detention alleged to be justified as an investigative stop, "the proper inquiry is whether during the detention, the officer diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *State v. Simpson,* 968 S.W.2d 776, 781 (1998). As Officer Kohl admits, her concerns about the defendant's possible intoxication and fatigue were alleviated after a brief conversation with the defendant. The officer did express concerns over the presence of a gallon of water and food bags located in the front seat of the car. In addition, the officer thought it strange that the defendant did not know the exact address he was going to in Georgia and was planning to call to get directions upon his arrival in Georgia. Notwithstanding such idiosyncracies, I see no reasonable basis for the officer's suspicions that the defendant was a drug courier. Clearly, this officer had a "hunch" that proved correct. Nevertheless, "hunches," no matter how many times they are correct, do not equate to a reasonable basis to detain. As the Supreme Court has repeatedly recognized, a search or seizure that is unlawful at it's inception may not be "validated by what it turns up." *Wong Sun v. United States,* 371 U.S. 471, 484, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963). Therefore, even if the officer's initial stop of the defendant had been supported by a reasonable suspicion that he was intoxicated, the continued detention of the defendant beyond that necessary to determine that he was not intoxicated was unlawful. To be clear, I conclude that the officer, after a brief

conversation with the driver, should not have taken his drivers license and registration and detained him further.

Next, I find no authority for the detention of a citizen to issue a warning ticket under circumstances such as the ones in the instant case. A warning ticket may be issued when a driver has violated a traffic law or the officer has probable cause to believe a traffic offense has occurred. For example, if a driver is exceeding the speed limit by traveling 62 miles per hour in a 55 miles-per-hour zone, a violation of the traffic law has occurred, and the officer has probable cause to stop the vehicle and the authority to issue the driver a ticket. In addition, the officer has the discretion to issue a warning ticket, which has no fine, requires no court appearance, and does not affect the driver's insurance rating. Nothing in this opinion should be construed to suggest any impropriety in the issuance of a warning ticket under such circumstances.

In the instant case, however, the warning ticket was not issued under the typical circumstances. To begin with, the defendant had not violated the law or created a reasonable suspicion that he was violating the law. In addition, Officer Kohl acknowledged that her (unreasonable) suspicions concerning the defendant's intoxication and fatigue were dispelled after a brief conversation with the defendant. In short, the officer concluded the defendant was not intoxicated or fatigued to the point that he could not have continued his trip safely. As such, I am troubled by the officer's detention of this citizen for the purpose of issuing him a warning ticket. I question: what is the officer warning the defendant about? The officer asserts the warning ticket was to remind the defendant that he should pull over and rest if he should get sleepy in the future. This is tantamount to stopping a driver driving 64

miles per hour in a 65 mile-per-hour zone and issuing a warning ticket to remind the driver that he or she will be speeding if he or she drives two miles per hour faster. I know of no authority for the issuance of such a warning.

In the context of the instant case, the issuance of the warning ticket resulted in the continuation of an already unlawful detention, and appears to have been a pre-text to allow the officer the opportunity to prepare a consent to search form in Spanish. The warning ticket took some ten to twelve minutes to issue. A similar time frame for the issuance of a valid ticket is reasonable. However, the critical problem I see in this case is the fact that an otherwise law-abiding citizen was subjected to the same amount of detention as a full-blown law breaker. Under the circumstances, the continued detention of the defendant to prepare and issue a warning ticket was unreasonable.

Finally, I conclude that the consent to search was so closely related to the unlawful stop and continued unlawful detention that it cannot be viewed as "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Wong Sun,* 371 U.S. at 486. After returning his license and registration and giving him the so-called warning ticket, Officer Kohl informed the defendant that the stop was complete. However, the officer's statement that the stop was complete was negated by the defendant's poor understanding of English coupled with the fact that mere seconds elapsed before the officer effectively ordered him to return to the back of his vehicle to answer more questions. A citizen given a warning ticket, as issued in this case, would reasonably believe that they had broken the law and that, but for the generosity of the officer, they would be required to pay a fine, appear in court, and have their insurance rates increased. Placed in such a situation,

the citizen would surely feel pressured to appear cooperative by consenting to the officer's request to search. Indeed, there is little doubt that some officers give warning tickets in order to facilitate a request for consent to search. I do not mean to suggest that the consent is involuntary when a citizen, who has broken the law and been given a warning ticket, gives consent out of a sense of obligation. However, when, as in the instant case, no law was broken and no probable cause or reasonable suspicion existed for the initial stop and continued detention, the officer may not use the unlawful seizure to exert pressure on the citizen to give consent to search.

As the majority points out, the causal connection between the illegal seizure and a consent to search must be broken to purge the taint of the illegal seizure. However, the majority goes on to conclude that the relationship between the unlawful detention and the consent to search was broken because of the presence of intervening factors such as Officer Kohl's "communication to the driver that he [was] free to leave prior to requesting consent to search and her advice to the driver of his right to refuse consent." I disagree. This mechanical application of such factors to validate the defendant's consent to search ignores the underlying question of whether the consent to search was obtained "by exploitation of the primarily illegality." My review of the record and video tape revealed a perfectly choreographed performance by the officer subjectively calculated to and objectively resulting in exploitation of the illegal stop and detention of the defendant in order to obtain his consent to search. Assuming arguendo that the purpose of the illegal stop was not to obtain consent to search the defendant's vehicle, the continued detention of the defendant under the guise of issuing a warning ticket

was clearly in pursuance of a conscious objective to obtain consent to search. The officer used the time to fill out a consent to search form and radio for an officer and drug dog to assist with the search. After the canine drug unit arrived, and Officer Kohl finished preparing the consent to search form, the warning ticket was given to the defendant, he was told the stop was complete and immediately ordered by the officer's hand signals to come to the back of the vehicle. He was then asked permission to search his vehicle.

I conclude that the officer's misconduct was flagrant, and the purpose of the misconduct, i.e. the continued illegal detention of the defendant, was to obtain consent to search. Furthermore, the temporal proximity between the cessation of the unlawful seizure and the consent to search was mere seconds. Finally, there were no sufficient intervening circumstances to break the causal connection between the illegal seizure and the consent to search. The defendant was told he was free to leave only to be recalled before he could take two steps towards his car. The officer then presented him with a prepared consent to search form in Spanish, while the other officer looked on from his police vehicle waiting to conduct the search. I would, therefore, reverse the trial court's denial of the defendant's motion to suppress the evidence obtained during the search of his vehicle because the consent was derived without a sufficient break in the causal connection to the unlawful detention of the defendant to be sufficiently an act of free will to purge the primary taint of the unlawful detention.

/s/ John Everett Williams
JOHN EVERETT WILLIAMS,
JUDGE

IN THE CRIMINAL COURT FOR
DAVIDSON COUNTY, TENNESSEE DIVISION I

STATE OF TENNESSEE	) CASE NO. 99-C-2220
V.	)
GONZALO MORAN GARCIA	)

ORDER

(Filed Feb. 8, 2000)

This cause came to be heard on December 10, 1999, upon the motion of the defendant, Gonzalo Moran Garcia, to suppress physical evidence and statements obtained by police as the result of an illegal seizure and subsequent illegal search of his vehicle on May 9, 1999. The defendant is charged with possession with intent to deliver one thousand (1,000) grams or more of a substance containing methamphetamine, a violation of Tenn. Code Ann. § 39-17-417 (1997).

The Court heard proof at the hearing from Metro Police officers who conducted the stop and search in question, as well as testimony from the defendant. Following the hearing, the Court took the matter under advisement. After considering the proof at the hearing and the relevant authorities the Court finds that the seizure involving the defendant was based upon reasonable suspicion; the defendant has standing to challenge the subsequent search of the vehicle; the initial search of the vehicle was based upon consent; the extended search of the vehicle's exterior rocker panels was based upon consent and further probable cause; and suppression of the evidence is not warranted based on any alleged violation of

the provisions of the Vienna Convention. Based upon these findings, the Court is of the opinion that the physical evidence and statements obtained as a result of the search and seizure should not be suppressed as "fruit of the poisonous tree." Therefore, the defendant's motion is overruled and denied.

The proof at the hearing consisted of the following:

Officer Kohl testified that she had been employed as a Metro Police officer for the past eleven (11) years and is part of the 20th Judicial District Drug Task Force. In regards to her training as an officer, she testified that she had received specialized training in drug interdiction and had attended various drug interdiction schools conducted by the DEA and U.S. Customs Service.

The officer testified that she was on duty on May 9, 1999, and had just finished a traffic stop at Interstate 40 near Fesslers Lane before encountering the defendant. According to her testimony, she observed the defendant traveling east in the right-hand lane near the Interstate 24/40 split at approximately 10:50 p.m. She explained that her vehicle was two lanes over from the defendant's vehicle, and both were traveling in the same direction. The officer stated that her attention was drawn to the defendant's vehicle because it "veered over to the right onto the right lane marker and came back." The officer slowed her vehicle down and moved into the adjacent lane in order to monitor the defendant's vehicle. Upon further observation, Officer Kohl testified that the defendant's vehicle would "stay in its lane of traffic," but "would go to the left lane marker; then it would swerve to the right lane marker; then it would swerve over to the left lane marker." Based on her observations, the officer believed that the driver

was either intoxicated or too tired to be driving. She further testified that she became concerned for the driver's safety, as well as the safety for other motorists and decided to stop the defendant's vehicle.

Once the stop was made, Officer Kohl instructed the defendant to step to the rear of the vehicle. She testified that she asked the defendant if he spoke Spanish, and that he responded affirmatively. The officer then proceeded to communicate with the defendant in Spanish,[1] but subsequently changed to English based on the defendant's responsiveness to her questions. While at the rear of the vehicle, the officer informed the defendant that she had stopped the vehicle because he was weaving. The officer stated that she asked the defendant if he had been drinking or was tired. She testified that he replied that he had not been drinking. but was tired. According to the officer, he informed her that he had been driving since he left Los Angeles on the previous day and had slept briefly at rest stops. In terms of where the defendant was going, Officer Kohl stated that the defendant told her that he was traveling to Georgia, but could not tell her where in Georgia. She testified that he informed her that "when he got close to the area, he had a pager number that he was supposed to call," and that the pager number belonged to his cousin, Miguel. Officer Kohl further described her conversation with the defendant in the following manner:

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[1] Officer Kohl testified that she was not an interpreter or a translator, but knew enough Spanish to "get through a traffic stop." She also testified that once the defendant was placed under arrest, Officer Rafael Fernandez, an officer who could speak Spanish, administered *Miranda* warnings to the defendant.

> I asked him if he knew where Miguel lived and he said "no." Then I asked him where he was going to stay at, and he said that he didn't know where he was going to stay; he thought a hotel maybe. Then I asked him if the vehicle was his vehicle, and he said "no," that it belonged to his cousin. I asked him what his cousin's name was and he told me . . . "he's not really my cousin." So I then I said . . . who is he? [The defendant said] "He's my friend." So then I said . . . "he is a friend who is like a cousin." I said okay, what is your cousin's name, and he gave me a name. I said . . . that's nice of him to let you borrow the car on this trip. He said . . . "he is not really my friend." I said . . . then who is he? He said "he is a friend of my friend at work."

After the conversation, the officer asked the defendant to produce his driver's license and the vehicle's registration,[2] which the defendant was able to produce. The registration showed that the vehicle was registered to Fernandez Orosco Efrain of Los Angeles, California. According to the officer, she could not recall whether the name on the registration was a name the defendant had given her as being the person who owned the vehicle in their prior conversation.

Officer Kohl informed the defendant that she was going to issue him a warning citation[3] and gave him directions to the Hickory Hollow area in order for him to get some sleep before continuing to drive. The officer directed the defendant to return to his vehicle while she

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[2] State's Exhibit #1.

[3] State's Exhibit #2.

filled out the traffic citation in her vehicle. The officer testified that she returned to her vehicle and filled out the warning citation and a written consent form,[4] which was written in Spanish. She also requested that Officer Dean Hunter bring his drug detection canine to the location. After filling the paperwork, the officer returned to the defendant's vehicle and asked him to step out of the vehicle again. She returned his driver's license and registration, handed him the warning ticket and advised him what to do if he became sleepy while driving. She also informed him that the stop was complete.

While walking back to his vehicle, the officer turned around and asked the defendant if she could ask him some additional questions. The defendant returned to the area behind the vehicle and the officer asked him whether he had any weapons in the vehicle. He informed her that he did not. She asked him if he had any drugs in the vehicle. According to the officer, the defendant's demeanor changed when she asked him about drugs. She testified that he responded with "a nervous, laughing 'no.'" She further observed the defendant became "fidgety" and nervous. Next the officer asked the defendant if she could search his vehicle. She stated that he responded affirmatively and asked her if she wanted him to open the trunk. The officer then retrieved the written consent form from her patrol car. She stated that she asked the defendant if he was able to read in Spanish, and that he replied that he could. She directed the defendant to read the form and sign if he understood it and agreed to its terms. According

[4] State's Exhibit #3.

to the officer, as the defendant appeared to be reading the form and was using his finger to follow each sentence. Once he was finished, the officer testified that he verbally indicated to her that it was okay to search the vehicle and signed his name on the written form.

Officer Kohl testified that by the time the defendant signed the consent form, Officer Hunter had arrived at the location with a trained narcotics detection dog. She stated that she and the defendant stepped to the side of her vehicle while Officer Hunter proceeded with his canine around the vehicle. According to Officer Kohl, Officer Hunter advised her that the dog was alerting on the doors of the vehicle. At that point, Officer Kohl testified that the car was searched by herself and Officer Hunter.

During the search, Officer Kohl explained that Officer Hunter informed her that the paint on the rocker panels of the vehicle was new and did not match the paint on the rest of the vehicle. She stated that Officer Hunter removed the screws from one of the panels and inserted a metal probe. She noticed that the probe met some resistance as it was being inserted. As a result, the officers then used a drill to go further inside the panel. After drilling, Officer Kohl stated that "white cloth type material" was coming out of the hole where Officer Hunter had drilled. Officer Kohl then retrieved a depth density meter from her vehicle and placed it on the panel of the defendant's car. She explained that she had received training on how to use the device from a school conducted by the U.S. Customs Service. She testified that the device displayed a high reading indicating that there was something inside the panel. The officer stated that further drilling was done, and that a "pinkish-brown" substance was found on the drill bit after it was removed. She explained that a power

tool was used to strike the panel, which subsequently broke. She noted that the panel had been "sawed, like in rectangular pieces and bondoed over." Once the panel broke, the officer testified that she saw "duct-taped bundles." According to the officer, the substance in the bundles was tested and found to be approximately twenty (20) kilograms of methamphetamine. In terms of time frame, the officer testified that there was approximately a forty (40) minutes time period from the point the search was initiated to the time the drugs were found.

The officer also explained that the video tape recorder captured the events she described on video tape.[5] Officer Kohl stated that the recorder had been left on as the result of a traffic stop she conducted right before encountering the defendant. She noted that the audio portion of the video was not working properly and had not recorded the conversations between herself and the defendant.

In terms of the defendant's arrest, Officer Kohl stated that she was not familiar with the provisions of the Vienna Convention and never asked the defendant whether he was a United States citizen.

Officer Hunter testified that he is employed as a Metro Police officer and is also assigned to the 20th Judicial District Drug Task Force Drug [sic], specifically, the drug interdiction unit and was employed in such capacity on May 9, 1999. He also explained that he is the handler of the drug detection canine which was used during the traffic stop involving the defendant. The officer testified in

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[5] State's Exhibit #4.

detail regarding the training of the canine, and that the canine is certified by the United States Police Canine Association and a regional organization and was certified in such capacity on May 9, 1999. Officer Hunter stated that he has twenty (20) years experience as a police officer, fourteen (14) years experience as a canine handler and is also certified as a trainer of canines by the United States Police Canine Association.

In terms of assisting Officer Kohl, Officer Hunter testified that he was asked by Officer Kohl to utilize the canine on the defendant's vehicle. He explained that as he was trying to position the dog at the front of the vehicle, the dog immediately gave an initial response as they walked by the vehicle. He further explained that the dog never gave him time to get "set-up" at the front of the vehicle and began to go around the vehicle on his own. The officer testified that the dog alerted three (3) separate times on the driver's side and one (1) time on the passenger's side of the vehicle. Specifically, he noted that the alerts occurred "on both sides of the vehicle, between the front and rear wheels."

Officer Hunter testified that he noticed the difference in the between the rocker panels and the paint on the rest of the vehicle. He noted that this caught his attention based on his prior experience of working in a body shop. The officer stated that this led him to remove the screws from one of the panels and place a metal probe inside the panel. He explained that he met resistance when he pushed the probe through the panel. According to the officer, this indicated to him "that something was in the rocker panel that wasn't necessarily supposed to be there." In order to determine what was inside the panel, the officer drilled inside the screw holes of the panel and

explained that the drill was pulling out a white cloth-type material and a pinkish-brown powder substance. He further stated that he used a metal object to strike the panel, and when this occurred, the panel broke where it had been pieced together with "bondo." At that point, the officer testified that he saw the bundles inside the panel. The officer further described the panel as a "hidden compartment."

Following testimony from the State's witnesses at the hearing, the State had an interpreter read the contents of the consent to search form into the record. The relevant portions of the signed form state that the person signing the form gives police permission to search the complete vehicle; whatever is found could be used against the person by the police; the person understands his rights, or the ones affected; the person could deny consent to search; the person could limit the search to certain areas of the vehicle; and the person could revoke the consent at any time.

The defendant testified as to the issue of standing. According to the defendant, the owner of the vehicle is Efrain Orosco, who was on a two-month vacation in Mexico at the time of the stop, Efrain Orosco gave him permission to drive the vehicle; he has known the owner for three (3) years; he knows the owner through his employment as a construction worker; he possessed the vehicle for three (3) days before the traffic stop; and that the owner knew that he was going to use the vehicle to visit one of his cousins. The defendant denied telling Officer Kohl that he borrowed the vehicle from "a friend of the owner" or "a friend of a friend."

Both parties stipulated that Officer Rafael Fernanzez's[6] testimony would be the same as that given at the preliminary hearing in this matter. Specifically, the officer would testify that the defendant told him that he was traveling from California to Georgia, and that the vehicle belonged to a friend of his in California.

The defendant contends that all physical evidence and statements obtained by the police should be suppressed as the result of an illegal stop, an illegal search and an illegal arrest. Specifically, counsel's arguments are as follows: (1) Officer Kohl lacked probable cause to stop the defendant's vehicle; (2) the defendant was unreasonably detained following the initial traffic stop; (3) the search of the defendant's vehicle exceeded any consent to search applying an objective test; (4) the search of the defendant's vehicle exceeded any probable cause that the police may have had; (5) the evidence should be suppressed because police failed to comply with the requirements of the Vienna Convention; and (6) any consent that may have been made would not validate the search of the vehicle because police had no grounds to request such consent.

The State contends that the initial stop of the defendant's vehicle was lawful; the defendant lacks standing to challenge the search of the vehicle; the defendant voluntarily consented to the search of the vehicle; and that the evidence cannot be suppressed because of an alleged violation of the provisions of the Vienna Convention.

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[6] Defense counsel informed the Court that Officer Fernandez had been subpoenaed for the hearing, but was ill and could not be present.

The first issue for determination is whether the initial stop of the defendant was constitutional. The protections provided by both the state and federal constitutions apply to searches and seizures of the person. *State v. Simpson*, 968 S.W.2d 776, 789 (Tenn. 1998). A traffic stop initiated by a police officer constitutes a seizure and implicates the protection of both the state and federal constitutions. *See State v. Yeargan*, 958 S.W.2d 626, 630 (Tenn. 1997). Warrantless searches and seizures are presumed to be unreasonable. *See id* at 29. It is the burden of the State to prove by a preponderance of the evidence that the search or seizure falls under a recognized exception to the warrant requirement. *See id.* Generally, "the stop of an automobile is constitutionally reasonable, under both the state and federal constitutions, if the police have probable cause or reasonable suspicion to believe that a traffic violation has occurred." *State v. Vineyard*, 958 S.W.2d 730, 734 (Term. 1997).

The defendant contends that the stop was initiated without probable cause. The State argues that based upon Officer Kohl's testimony, she had probable cause to stop the defendant for violating § 12.68.170 of the Metropolitan Traffic Code. That section is titled "careless driving" and directs drivers in Davidson County to drive:

> in a careful and prudent manner, having regard for the width, grade, curves, corners, traffic and use of these streets and private areas, and all other attendant circumstances, so as not to endanger the life, limb or property of any person. Failure to drive in such a manner shall constitute careless driving. . . . "

Tennessee Code Annotated § 7-3-501 states:

> When any person violates an ordinance, . . . of a metropolitan government, any police or peace officer . . . authorized to enforce such ordinance, . . . in whose presence the violation is committed or who determines after investigation that there is probable cause such a violation is committed, may issue a citation . . . giving a copy to the violator, *showing the ordinance, law or regulation violated* and the date, time and place when the violator is to appear in court.

(emphasis added).

At the hearing, Officer Kohl did not specifically testify that the propose of the stop was based on a violation of § 12.68.170 of the Metropolitan Traffic Code. She did state that she became concerned for the defendant's safety, as well as for the safety of the other motorists. However, the warning citation issued did not reference the cited section of the Metro Code, nor did it state "careless driving." Rather, it listed "lane restrictions." Based on those factors, the Court finds that the stop was not based on probable cause for a violation of the cited ordinance, *supra.*

However, as noted previously, traffic stops can be justified under the lesser standard of reasonable suspicion. *See State v. Vineyard,* 958 S.W.2d at 734; *Yeargan*, 958 S.W.2d at 633. Therefore, the issue becomes whether there was sufficient reasonable suspicion to justify the stop of the defendant's vehicle. In order to justify the seizure, the officer must have at least reasonable suspicion, based upon specific and articulable facts, that the motorist has been involved or is about to be involved in criminal activity. *See Simpson,* 968 S.W.2d at 780. In evaluating whether there is reasonable suspicion, "a court must

consider the totality of the circumstances." *See id* at 783. Relevant factors include "the officer's personal objective observations, information obtained from other police officers or agencies, information obtained from citizens, and the pattern of operation of certain offender." *Id.* Additional factors include "the characteristics of the area, the behavior of the driver, and the aspects of the vehicle itself." *State v. Scarlett,* 880 S.W.2d 707, 709 (Tenn. Crim. App. 1993). Further, "a court must also consider the rational inferences and deductions that a trained officer may draw from the facts and circumstances known to him – inferences and deductions that might well elude an untrained person." *Id.*

Several recent unreported decisions of the Court of Criminal Appeals have addressed the constitutionality of traffic stops similar to the one in the case at bar. In *State v. Black,* No. 03C01-9812-CR-00424, 1999 WL 1273510 (Tem. Crim. App. Dec. 29, 1999), the court upheld a stop involving a vehicle that was swerving within its own lane. The officer in that case testified that the "vehicle was driving all over that one lane," and that the vehicle almost struck "the right edge of the roadway." According to the officer, he stopped the vehicle "to make sure everything was okay." The court concluded that the comment of the officer that the defendant "was driving all over that one lane" indicated that the defendant was weaving excessively and was evidence of erratic driving which justified the investigatory stop of the defendant's vehicle. *Id* at *1. In addressing weaving within one's own lane, the court explained:

> We realize that no driver drives perfectly at all times and that some movement inside a driver's own lane of travel is only natural and does not automatically constitute reasonable suspicion of

> criminal activity. There must be specific and articulate evidence of actions by a driver which would qualify as erratic driving, as opposed to mere inattention to detail and imperfection, before an investigatory stop is justified based on the manner of driving of a vehicle when no traffic laws have been violated.

Id. it *5

The case of *State v. Allen,* No. 01C01-9707-CC-00272, 1998 WL 458177 (Tenn. Crim. App. Aug. 7, 1998), *perm. to appeal denied*, (Tenn. 1999), is strikingly similar to the case at bar, not only in terms of the traffic stop, but also on the issues concerning unlawful detention and consent to search. In that case, the officer testified that the defendant's vehicle was stopped because he thought that the defendant was either drowsy or under the influence of an intoxicant. He based this conclusion on the fact that the vehicle changed from the right lane to the left lane for no apparent reason and also twice crossed over the white fog line on the right-hand side of the road. The court found that based on the officer's testimony, the initial investigatory stop was justified *See id* at *3

Another related case is *State v. Binnette,* No. 03C01-9802-CR-00075, 1999 WL 427606 (Tenn. Crim. App. June 28, 1999), *perm to appeal granted,* (Tenn. 1999). After viewing the officer's video in that case (the officer did not testify), the trial court concluded that "there was significant weaving *within the lines*,. . . . "*See id* at *1 (emphasis added). The Court of Criminal Appeals affirmed, stating that "[t]his court's review of the videotape reveals the same objective view of the evidence seen by the trial court. Defendant's vehicle did swerve and weave, although

certainly not to an exaggerated degree, and touched the center line at least twice." *See id* at *1.

In *State v. Loden,* No. 03C01-9311-CR-00380, 1995 WL 23351 (Tenn. Crim. App. Jan. 19, 1995), *perm. to appeal denied,* (Tenn. 1995), the Court of Criminal Appeals found that there was reasonable suspicion for a traffic stop based on the evidence that the driver was "driving his car very slowly, swerving back and forth and hugging the white fog line, after which he had darted across a lane to make a turn." *See id* at *3.

The defendant has submitted the case of *State v. Smith*, No. M1999-01439-CCA-R3-CD, 1999 WL 1103492 (Tenn. Crim. App. Dec. 7, 1999). In that case, the Court of Criminal Appeals found that the stop in that particular case was not supported by reasonable suspicion. *See id* at *7. The officer testified that he stopped the defendant's vehicle because the defendant "changed lanes twice without giving a signal, while in the process of passing another vehicle." Further, he noted that after the defendant's vehicle passed and returned to the right Jane of travel. "it was driving on the white line near the edge of the roadway, however, the officer testified that the stop was based solely on the defendant's failure to give a signal when passing. The court noted that the officer did not state that the defendant's vehicle created any type of a hazard, or that it almost caused and accident. *See id* at *8. In terms of the testimony concerning driving on the white line, the court stated that

> [d]riving on the white line might warrant an officer in further observance of a vehicle, but standing alone, it is not a sufficient and articulable fact to warrant the finding of reasonable suspicion to stop an automobile. We are reluctant to

> conclude that a person driving in a manner that an officer deems "improper," when the driving is not erratic or haphazard and does not create a dangerous situation, is subject to seizure while proceeding along a highway in a lawful manner. Only the hypothetical "perfect driver" would not be subject to seizure if we were to hold that minor driving "errors," which neither violate our traffic code nor create a hazard, indicate that a person might be intoxicated.

Id. at *8

In analyzing the facts surrounding the stop in this case, the Court finds that this case is analogous to *Black, Allen, Binnette* and *Loden,* rather than *Smith, supra.* Officer Kohl explained that her attention was drawn to the defendant's vehicle because it "veered over to the right onto the right lane marker and came back." Upon noticing this, she slowed her vehicle down to monitor the defendant further. She then observed that the defendant's vehicle would "stay in its lane of traffic," but "would go to the left lane marker; then it would swerve to the right lane marker; then it would swerve over to the left lane marker." Based on these observations, the officer concluded that the driver was either intoxicated or too tired to be driving. She testified that she became concerned for the driver's safety, as well as the safety for other motorists and decided to stop the defendant's vehicle.[7]

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[7] For clarification, Officer Kohl's testimony and the video tape of the stop indicate that the alleged weaving occurred before activation of the officer's blue lights. There is no testimony indicating that the stop was based upon any actions which occurred after the blue lights were

(Continued on following page)

The Court has reviewed the video tape recorded by Officer Kohl and finds that it does support her testimony. As she approaches the defendant's vehicle from two lanes over, it noticeably swerves to the right side of the lane.[8] The Court finds it significant that the officer did not immediately stop the vehicle, but rather, began to monitor the vehicle to determine whether the swerving would continue. In reviewing the video, the Court noted two other times, approximately 20 and 65 seconds from the officer's initial observation (according to the time indicated on the video), that the defendant's vehicle noticeably swerves from one side of the lane to the other[9] Also significant, and in further support of the officer's testimony, is the fact that there were several other vehicles traveling parallel to and in close proximity to the defendant's vehicle. This supports her testimony regarding the safety of the other motorists on the road. In addition, the Court would note that for a short period of time the defendant's vehicle is not on videotape and could only have been observed by the officer. During this occasion and the initial observations made at the time when the defendant's vehicle was several car lengths ahead of the officer, only the officer, not the videotape, could accurately observe the defendant's driving pattern. While the Court would not necessarily classify the defendant's driving as "erratic," it was clearly characteristic of a driver who was either

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activated. *See Slate v. Block.* No. 03C01-9812-CR-00424, 1999 WL 1273510, at *4 (Tenn. Crim. App. Dec, 29, 1999).

[8] The time of the officer's initial observation of the defendant appears to be at approximately 22:50:21 on the video tape.

[9] The subsequent incidents of swerving appear to have occurred at approximately 22:50:40 and 22:51:25 on the video tape.

intoxicated or about to fall asleep at the wheel. The fact that there were other vehicles in close proximity to the defendant amplified the situation. As it turned out, the defendant admitted that he was very tired and had been driving for a long period of time, which confirmed the officer's suspicion. Therefore, the Court credits the testimony of Officer Kohl and finds that the stop was based upon reasonable suspicion.

The second issue for determination is whether the defendant was detained unreasonably, following the initial traffic stop. The defendant asserts that "[t]he prolonged detention of the defendant beyond the time required to issue him the warning citation and the extended questioning of him about matters beyond the scope of a traffic stop for inner-lane weaving poison the subsequent search of his motor vehicle and the interrogation of him." See Defendant's Memorandum in Support of Motion to Suppress.

According to the time notation indicated on the video tape, the time period from when Officer Kohl turned on her blue lights to when she handed the defendant the warning ticket was approximately 14-15 minutes.[10] The defendant first contends that the questions asked by Officer Kohl were beyond the scope of the traffic stop and caused the defendant to be detained unreasonably under the federal and state constitutions. The Court disagrees and finds that the questions posed by Officer Kohl were not beyond the scope of the traffic stop. As already indicated by the Court, Officer Kohl had reasonable suspicion

[10] The officer's blue lights were activated at approximately 22:53:02. The traffic stop appears to have concluded at 23:07:26.

to believe that the defendant was intoxicated or was about to fall asleep at the wheel. She testified that the defendant explained that the reason he was tired was because he had been driving since leaving Los Angeles the previous day (this is implausible in and of itself) and had only slept briefly at a few rest stops. The conversation logically continued with a discussion concerning the defendant's destination and ownership of the vehicle. *See e.g., United States v. Hill,* 195 F.3d 258, 268 (6th Cir. 1999) (questions related to the defendant's purpose for travel are reasonable during a traffic stop). Officer Kohl's testimony regarding the questions she asked also indicated that she was trying to determine whether the defendant was intoxicated or just tired.

In terms of the additional time it took Officer Kohl to fill out a consent to search form and request that a drug detection dog be sent to the location, the Court finds that these actions by the officer were not unreasonable under the state and federal constitutions and were supported by reasonable suspicion that the defendant was engaged in criminal activity at the time she was filling out the form and making the request. The defendant's evasiveness in answering the officer's questions regarding his destination and the ownership of the vehicle, along with the fact that the vehicle had California license plates, created rational inferences and deductions that the defendant's vehicle was possibly stolen, or that he was possible [sic] engaged in transporting contraband. *See Simpson,* 968 S.W.2d at 783. Further, the Tennessee Supreme Court has stated that "responses by the suspect which the officer knows to be false, or which are implausible, conflicting, evasive or unresponsive may well constitute probable cause when considered with the prior suspicions." *State v. Shrum,* 643

S.W.2d 891, 894 (Tenn. 1982) (quoting 1 LaFave, *Search and Seizure* § 3.6(f), at 671, et seq. (1978). While the evasiveness of the defendant's responses did not rise to the level of giving the officer probable cause to arrest or search the defendant's vehicle at that point during the stop, it did give the officer reasonable suspicion to detain the defendant long enough to fill out the consent form, request the drug detection dog and to ask the defendant for his consent to search the vehicle.

In regards to the additional questioning concerning whether there was contraband in the vehicle and whether the defendant would consent to having the vehicle searched, the Court finds that these actions were also based upon reasonable suspicion. According to the video tape, the time period between when the traffic stop is concluded and when the canine sweep is performed is approximately 6-7 minutes.[11] As noted *supra,* the additional 6-7 minute delay from when the traffic stop for weaving was concluded to when the canine sweep was completed was based upon reasonable suspicion stemming from the defendant's response to the officer's questions concerning his destination and who the vehicle belonged to. The federal appellate courts have generally held that the limited length of time it takes to wait on a drug detection dog is reasonable where the investigatory stop is based upon reasonable suspicion. *See United States v.*

[11] The video depicts that the defendant is handed his documents and turns around in order to return to his vehicle at approximately 23:07:26. The video then shows another brief conversation between the officer and the defendant which lasts approximately one minute. Officer Hunter then sweeps the vehicle with the canine. The canine sweep is concluded at approximately 23:13:07.

Griffin, 150 F.3d 778, 784 (7th Cir. 1998) (search was reasonable after a 20 minute wait on the arrival of a drug detection dog); *United States v. McFerley,* 991 F.2d 1188, 1193 (4th Cir. 1992) (search upheld after 38 minute wait); *United States v. Hardy,* 855 F.2d 1188, 1193 (11th Cir. 1988) (search upheld after 50 minute wait).

It should also be noted that Officer Kohl testified that during the brief conversation between when the traffic stop was concluded and before the canine sweep was conducted, the defendant became visibly nervous when she asked him whether the vehicle contained any contraband, thus adding further to her suspicions.

The unpublished case of *State v. England*, No. 01C01-9702-CR-00064, 1998 WL 155584 (Tenn. Crim. App. Mar. 31, 1998), *perm to appeal granted*, (Tenn. 1999), is also instructive on the issue. In that case, police initiated a traffic stop because the defendant's license plate had no illumination. During the stop, the officer "struck up a conversation" with the defendant and asked him if he had ever been arrested before. The defendant informed him that he had been arrested for "dope." The officer asked the defendant for consent to search the vehicle, and the defendant refused. The officer also explained that when he received the computer check back, the defendant would be free to leave. A canine officer then arrived on the scene, and the defendant was further detained while the officer performed a drug dog sweep around the perimeter of the vehicle. The dog alerted on the vehicle, and the vehicle was searched. Contraband was found as a result of the search. The trial court found that the initial stop was legal but suppressed the fruits of the search concluding that once the defendant refused consent to search the vehicle, the detention should have ended. The trial court further

noted that had the officer performed the canine sweep at the beginning of the initial stop or during the pending license check, the evidence would have been admissible.

On appeal, the Court of Criminal Appeals found that the stop, the length of the detention of the stop and the canine sweep were reasonable. *See id.* *4. Further, the court stated that "[a] sweep of the outside of a vehicle by a trained drug dog does not constitute a search for Fourth Amendment purposes, but is a legitimate investigative technique." *Id.* (citing *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). In regards to whether the canine sweep should have occurred before the officer concluded the traffic stop, the court explained that "[b]ecause the officer could have taken this action [dog sweep] at any time during the otherwise legal detention, we do not believe that the fact that he took this action only after the Defendant refused to consent to the search is reason to render the search illegal." *Id.*

As to the detention of the defendant in the case at bar, the Court credits Officer Kohl's testimony and finds that any extended detention of the defendant after the initial stop was based upon reasonable suspicion. Even assuming Officer Kohl did not have reasonable suspicion, the Court would find that the "extended" detention in this case was minuscule and not unreasonable under either the state or federal constitutions and in light of the persuasive authority of *State v. England*, and *United States v. Hill*, *supra*.

The State contends that the defendant lacks standing to challenge the search and seizure of the drugs in this case. Therefore, the focus of the inquiry is whether the defendant had a property or possessory interest in the vehicle sufficient to create a "legitimate expectation of

privacy" in the place searched. In Tennessee, a person may have a legitimate expectation of privacy in property even if the property belongs to another. *See State v. Oody*, 823 S.W.2d 554, 560 (Tenn. Crim. App. 1991). The factors applicable to the standing inquiry are as follows:

> (1) property ownership; (2) whether the defendant has a possessory interest in the thing seized; (3) whether the defendant has a possessory interest in the place searched; (4) whether he has a right to exclude others from that place; (5) whether he has exhibited a subjective expectation that the place would remain free from governmental invasion; (6) whether he took normal precautions to maintain his privacy; and (7) whether he was legitimately on the premises.

Id.

The testimony offered during the hearing was contradictory concerning the defendant's relationship to the owner of the vehicle. The defendant testified during the hearing that the owner of the vehicle was a friend whom he knew through his employment as a construction worker. He explained that Orosco was on a two-month vacation in Mexico at the time, but had given him permission to drive the vehicle, and was aware that the defendant was going to use the vehicle to visit one of his cousins. Officer Kohl's testimony indicated that he had told her that the vehicle had been borrowed from "a friend of the owner" or "a friend of a friend," However, the officer was not certain whether the defendant had supplied her with the name of Efrain Orosco before he produced the vehicle's registration.

In applying the factors set out in *Oody* to the facts of this case, it is clear that the defendant did not own the

vehicle. Further, lie did not testify that he had a possessory interest in the contraband which was seized. While the Court credits the testimony of Officer Kohl concerning what the defendant allegedly stated to her during the stop, the Court finds that the defendant was in sole possession of the vehicle at the time of the search; he had the ability as the sole occupant to control or exclude others' use of the vehicle; and was able to produce a registration showing that the vehicle was registered to Efain Orosco, a resident of California. Further, the State presented no evidence that the vehicle was stolen. The Court has considered the relevant Tennessee authorities[12] and the persuasive authority of *United States v. Sanchez*, 943 F.2d 110 (1st Cir. 1991), submitted by the State, along with other federal cases[13] dealing with similar circumstances. Based on those authorities and the testimony presented at the hearing,

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[12] *See State v. Moore*, 775 S.W.2d 372 (Tenn. Crim. App. 1989); *State v. Harris*, No. 85, 1990 WL 171507 (Tenn. Crim. App. Nov. 8, 1990).

[13] *See United States v. Orrego-Fernandez*, 78 F.3d 1497 (10th Cir. 1996) (finding standing where defendant testified he had permission from the owner to use vehicle even though he could produce no registration); *United States v. Garcia*, 897 F.2d 1413 (5th Cir. 1990) (finding standing even where defendant did not know last name of owner of vehicle and where police could not prove vehicle was stolen); *United States v. Dotson*, 817 F.2d 1127 (5th Cir. 1987) (finding standing where defendant had permission from a friend to use a vehicle owned by his sister); *United States v. Miller*, 821 F.2d 546 (11th Cir. 1987) (finding standing to challenge search of car borrowed from friend); *United States v.* Kovac, 795 F.2d 1509 (9th Cir. 1986) (no standing where defendant was permitted use of the vehicle on a "sporadic" basis); *United States v. Obregon*, 738 F.2d 1371 (10th Cir. 1984) (no standing where vehicle was rented to another, but driven by the defendant with his permission); *United States v. Portillo*, 633 F.2d 1313 (9th Cir. 1980) (finding standing to challenge search of car borrowed from friend).

the Court finds that the defendant has established an expectation of privacy in the vehicle, albeit, by the narrowest of margins.

Regarding the issue of consent, the defendant first maintains that any consent that may have been given would not validate the search because the police had no basis to request such consent. As already stated *supra,* Officer Kohl had reasonable suspicion that the defendant was engaged in criminal activity based on the conversation between him and Officer Kohl concerning ownership of the vehicle and his destination. Therefore, the Court finds that the officer's request for consent to search the vehicle was properly based upon reasonable suspicion. *See Simpson,* 968 S.W.2d at 780.

The defendant next contends that the search of the vehicle exceeded the consent to search that he gave officers and any probable cause to search that the police may have had. It is undisputed that the defendant gave verbal and written consent to search the vehicle. According to the officer, he offered to open the trunk of the vehicle. He was also asked if he could read in Spanish and was given a Spanish version of the consent to search form. The defendant gave verbal consent and signed the consent form. While the issue of voluntariness of the consent has not been raised, the Court finds that the consent to search the vehicle given by the defendant was "unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." *See id.* at 784.

The defendant correctly notes the standard for measuring the scope of a suspect's consent "is that of 'objective reasonableness – what would the typical reasonable person have understood by the exchange between the

officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 111 S.Ct. 1801, 114 L.Ed.2d (1991).

The relevant provisions of the consent form that the defendant signed concerning the scope of the search stated that the person signing the form gives police permission to *search the complete vehicle*; the person signing *could limit the search to certain areas of the vehicle*; and the person signing *could revoke the consent at any time*. Notably, neither the defendant nor the officers offered any testimony that the defendant ever tried to limit or revoke the search in any way. The Court has not been cited to and is not aware of any Tennessee case which addresses specifically this scope of consent issue. However, a recent case from the Tenth Circuit has stated that "a failure to object to the continuation of a search indicates that the search was conducted within the scope of consent given." *United States v. Santurio,* 29 F.3d 550, 553 (10th Cir. 1994). In *Santoto*, the defendant's vehicle was stopped as the result of a speeding violation. Subsequently, the officer obtained a written consent to search form from the defendant, similar to the one in the case at bar, and searched the defendant's van. The officer noticed what appeared to be a false floor in the van. He raised the carpeting and noticed a 2 x 4 and a piece of steel which did not appear to be part of the van. He summoned a drug detection dog to the scene, which alerted to the presence of narcotics. The officer removed screws in the floor and saw several wrapped packages which contained narcotics. The court

upheld the search as "not so invasive as to exceed the scope of defendant's consent to the search." *Id.* at 553.[14]

Therefore, based on the provisions of the written consent form, the lack of any proof at the hearing that the defendant attempted to limit or revoke his permission to search the vehicle and the finding that the officers had sufficient probable cause to extend their search, discussed *infra*, the Court finds that the search conducted by police did not exceed the consent granted by the defendant.

Having found that the search in question was based upon valid consent and that the officers did not exceed the scope of that consent, the issue becomes whether the search exceeded probable cause that the officers may have had.

According to Officer Hunter's testimony, after the defendant provided consent his trained and certified drug detection canine alerted three (3) separate times on the driver's side and one (1) time on the passenger's side of the vehicle. Specifically, he noted that the alerts occurred "on both sides of the vehicle, between the front and rear wheels." It is well established that the positive alert of a

---

[14] Other federal cases upholding consensual searches where officers remove or dismantle parts of vehicles include: *United States v. Zapata*, 180 F.3d 1237 (11th Cir. 1999) (search did not exceed consent where officer removed interior door panel after he noticed that it was not fitted properly onto the door); *United States v. Garcia*, 897 F. 2d 1413 (7th Cir. 1990) (search did not exceed consent where officer removed interior door panel of vehicle after suspicions were aroused because of lack of door handles and ill-fitting screws); *United Stales v. Espinosa*, 782 F.2d 888 (10th Cir. 1986) (search did not exceed scope of consent where back seat was removed from automobile and interior panel of car was pulled back to expose underlying area).

trained drug detection canine provides probable cause to search a vehicle. *See United States v.* Hill, 195 F.3d 258, 273 (6th Cir. 1999); *State v. Ortiz*, No. M1998-00483-CCA-R3CD, 1999 WL 1295988, at *8 (Tenn. Crim. App. Dec. 30, 1999); *State v. Price*, No. 02C01-9610-CC-00356, 1997 WL 503073, at *5 (Tenn. Crim. App. Aug. 25, 1997), *perm. to appeal denied*, (Tenn. 1998). The Court credits Officer Hunter's testimony and finds that the positive canine alert provided probable cause to search the vehicle, and to specifically examine the parts of the vehicle the canine had alerted to. The issue then becomes whether the officers' removal of screws, use of a drill and ultimate removal of the rocker panels on the vehicle was supported by probable cause.

While the Court has not been cited to nor is aware of any Tennessee cases discussing the extension of a search based upon probable cause, the federal courts have addressed the issue. In *United Stales v. Martel-Martines,* 988 F.2d 855 (8th Cir. 1993), a police officer stopped the defendant's pick-up truck for speeding. Subsequently, the officer obtained consent to search the vehicle. The officer walked to the rear of the vehicle and saw a custom-cut plywood board covering the truck bed. The officer lifted up the board and saw two lines of caulking in the metal bed. The officer then looked underneath the vehicle and observed that the truck bed had recently been reconstructed to support a concealed compartment. Eventually, the vehicle was driven to a police garage where several officers removed the plywood, and with the defendant watching from a few feet away, used a hammer and screwdriver to puncture the sheet-metal top of the hidden compartment. The officers observed a brown object wrapped in cellophane through the puncture hole. The truck bed was then dismantled and 48 wrapped

packages of cocaine was [sic] found in the compartment. In upholding the search, the court noted the defendant's silence and failure to revoke the search, *see id.* at 858, and explained that "[i]nformation gathered during a consensual search can provide probable cause to search a vehicle more thoroughly or even to arrest its occupants." *Id.* at 859.

A similar result was found in *United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990), where the court held that the officers' visual observations of packages inside the vehicle's interior door panel (the officers peered through the window opening of the door) established probable cause to extend the search and take apart the door.

In the case at bar, as noted *supra,* the initial probable cause to search or examine the vehicle's exterior rocker panels was established by the canine. Further probable cause to search the panels was established by Officer Hunter's observation that the paint on the panels did not match the rest of the vehicle. The officer's action of removing the screws from one of the panels was justified based on the alert and the difference between the paint. The insertion of the metal probe, the reading of the density meter and the cloth type material and powdery substance coming from within the panel provided further probable cause to believe that drugs were hidden within a secret compartment within the panel. Each act taken by the officers provided further probable cause to extend the search. Apparently, the only way to obtain what was inside the panel was to strike it with a hard object. As Officer Kohl explained, once the panel was broken it was clear that a rectangular portion had been "sawed" out and "bondoed" back over. Both officers described the compartment as a "hidden compartment." Based on the testimony

of the officers and the persuasive authority of the federal cases cited *supra,* the Court finds that actions taken by the officers in obtaining the drugs from the vehicle were based upon probable cause.

The final issue for determination is whether the evidence should be suppressed on any violation concerning the provisions of the Vienna Convention. In his motion, the defendant alleges that "[a]t no time prior to his custodial interrogation or at the time that he was told to sign a consent to search form was defendant advised of his rights pursuant to the Vienna Convention or his ability to exercise those rights." See Defendant's Memorandum in Support of Motion to Suppress, p. 6. The Court assumes that the defendant is referring to Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, art. 36, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261. Essentially, that section provides that if a foreign national is "arrested or committed to prison or to custody pending trial or is detained in any other manner," he must be informed of his right to request that his consular be notified and his right to have a communication sent to the consular without delay.

Initially, the Court would note that the only proof in the record concerning an alleged violation of the treaty was that Officer Kohl stated that she was not familiar with the provisions of the Vienna Convention and never asked the defendant whether he was a United States citizen. The defendant has not cited to the Court, nor is the Court aware, of any Tennessee or U.S. Supreme Court case that stands for the proposition that the exclusionary rule applies where a foreign national who is detained or arrested is not informed of the particular provisions of the treaty noted *supra.*

The State has submitted the case of *United States v. Torres-Del Muro*, 58 F.Supp.2d 93 (C.D. Ill. 1999), where officers stopped the defendant's vehicle and determined him to be in the United States illegally. Immigration and Naturalization Services (INS) officials subsequently interrogated the defendant, and the defendant made Incriminating statements. The defendant was indicted by a federal grand jury and sought to suppress the statements given to INS officials based on the grounds that the INS officers failed to notify him of his right to consult with the Mexican Consulate. The district court denied suppression and explained that "nothing in the text of the Vienna Convention nor its history which manifests the signatory nations' intent to remedy violations of the treaty specifically through the exclusionary rule." *Id.* at 933-934. Further, the court stated that "the failure to notify the foreign national of his right to speak with his consul, *per se*, does not implicate constitutional rights." *Id.*

Other federal courts that have addressed the issue hold that in order to obtain relief of his or her right under the treaty, the defendant must show how the denial of the right resulted in prejudice. *See United States v. Esparza-Ponce*, 193 F.3d 1133, 1138, 39 (9th Cir. 1999); *United States v Ore-Irawa*, ___ F. Supp.2d ___, 1999 WL 1133590, at *2 (E.D. Mich. 1999); *United States v. Rodrigues,* 68 F.Supp.2d 178, 186-87 (E.D. N.Y. 1999); *United States v. Briscoe*, 69 F.Supp.2d 738, 746 (V.I. 1999).

The analysis *of United States v. Carrillo*, 70 F.Supp.2d 854 (N.D. Ill. 1999), is particularly persuasive in explaining why the exclusionary rule does not apply to violations of this particular treaty. The court explained that

> [s]pecifically, the exclusionary rule operates to suppress evidence where the government has violated an individual's constitutional rights under the Fourth. Fifth or Sixth Amendments. Thus, the 'exclusionary rule is generally not available for a violation of [a] statute.' The statute must expressly provide suppression as a remedy.
>
> The Vienna Convention, a treaty equivalent to a federal statute, does not provide suppression as a remedy. Moreover, it is well established that the Vienna Convention does not create any fundamental, constitutional rights. Put another way, a violation way, a violation of the Article 36 does not rise to the level of a constitutional violation.

Id. at 861.

Clearly from the proof presented in the hearing in this case, the defendant failed to show any proof of prejudice as a result of the alleged notification violation. As the Court noted *supra*, the defendant only established that Officer Kohl did not advise him of his right under the convention. There was no proof that the defendant was not subsequently advised of the right by another officer, and absolutely no showing of how the defendant's case has been prejudiced as a result of the violation. The Court finds the issue to be without merit.

Therefore, based on the foregoing analysis, the Court is of the opinion that the defendant's motion to suppress should be overruled and denied.

Entered this 8th day of February 2000.

/s/ Steve R. Dozier
Steve R. Dozier, Judge
Criminal Court, Division I

cc: Rich McGee
James Walker
John Zimmerman

IN THE CRIMINAL COURT OF TENNESSEE
AT NASHVILLE

THE TWENTIETH JUDICIAL DISTRICT

STATE OF TENNESSEE,	)	
Appellee,	)	CASE NO: 99-C-2220
vs.	)	MAY 15TH, 2000
	)	MAY 16TH, 2000
GONZALO GARCIA,	)	(FILED NOV. 17, 2000)
Appellant.	)	

TRANSCRIPT OF THE EVIDENCE
Volume Four of Four Volumes

THE HONORABLE STEVE R. DOZIER,
PRESIDING JUDGE

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* * *

[243] Q – is that the copy of the warning ticket that was given to you?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

MR. McGEE: Your Honor, I would ask that that be made an exhibit.

(Interpreter to witness)

THE COURT: All right.

(By interpreter to witness)

(EXHIBIT MARKED)

MR. McGEE: When Officer Kohl gave you the warning ticket, –

Q (By interpreter to witness)

Q – did she tell you that the stop was over?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q Did she tell you that you could leave?

[244] Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q After she told you that you could leave, –

Q (By interpreter to witness)

Q – did she ask you if she could search the car?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q Did you understand her?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q Did you consent in words to her and allow her to search the car?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q And, did she give you a written paper in Spanish?

Q (By interpreter to witness)

A (By wintess [sic] to interpreter)

A (By interpreter) Yes.

[245] MR. McGEE: Your Honor, may I see the document . . .

THE COURT: All right.

(There was a pause in the proceedings.)

MR. McGEE: Your Honor, may I approach the witness, please?

(By interpreter to witness)

MR. McGEE: Exhibit Number Thirteen –

(By interpreter to witness)

Q (Mr. McGee) Do you recognize Exhibit Thirteen?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) The one that they gave me was in Spanish.

MR. McGEE: May I see the document, please?

[246] (By interpreter to witness)

(There was a pause in the proceedings.)

MR. McGEE: Exhibit Thirteen, is that in Spanish?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q And, did you sign that?

Q (By interpreter to witness)

A (BY witness to interpreter)

A (By interpreter) Yes.

Q You recognize your signature?

Q (By interpreter to wintess [sic])

A (By witness to interpreter)

A (By interpreter) Yes.

Q Mr. Garica [sic], on the document there is number one, two and three.

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q And, did you read nubmers [sic] one, two and three?

Q (By interpreter to witness)

[247] A (By witneses [sic] to interpreter)

A (By interpreter) Yes.

Q Did you know that you could deny the officer's request to search?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q That's what the document says, is that right?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q And, did you know that you could tell the officer to stop the search at anytime?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q And, that's what the document says.

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Yes.

Q Why did you not tell the officers to stop searching the car?

Q (By interpreter to witness)

A (By witness to interpreter)

[248] A (By interpreter) Because I didn't have any reason to do so.

Q Why did you tell the officers that it was okay to search the car?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) Because what the forms says I was sure that – uh – there was nothing.

Q Nothing in the car?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) No.

Q We come back full circle, then, Mr. Garcia to my first question.

Q By interpreter to witness and then) . . . would you repeat the question, please?

Q We come full circle to my first question, then.

Q (By interpreter to witness)

Q Please look at the jury.

Q (By interpreter to witness)

Q Did you know drugs were in the car?

Q (By interpreter to witness)

A (By witness to interpreter)

A (By interpreter) No.

* * *

[331] CERTIFICATE

I, the undersigned, Marelle Newman, Official Court Reporter for the Twentieth Judicial District of the State of Tennessee, do hereby certify that the foregoing is a true, accurate and complete transcript, to the best of my knowledge and ability, of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Criminal Court for Davidson County, at Nashville, Tennessee, on the 15th and 16th days of May, 2000.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 12th, 2000
DATE

/s/ Marelle Newman
MARELLE NEWMAN
OFFICIAL COURT REPORTER
STATE OF TENNESSEE

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[332] IN THE CRIMINAL COURT OF
DAVIDSON COUNTY, TENNESSEE

TWENTIETH JUDICIAL DISTRICT

STATE OF TENNESSEE

VS. CASE NO: 99-C-2220

GONZALO GARCIA

ORDER APPROVING TRANSCRIPT OF THE EVIDENCE

This is to certify that the Transcript of the Evidence adduced at the trial of this case has been filed with the Clerk on 10-12-00, in accordance with Rule 24 of the Tennessee Rule of Appellate Procedure. The transcript has been examined by counsel for the defendant and the State and has been found by both to be a substantially true and accurate record of the proceedings.

This is to further certify that the Court has examined the Transcript of the Evidence and has found it to be a substantially true and accurate record of the proceedings.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the transcript of the Evidence is hereby

approved by the Court and counsel for the defendant and the State, and the Clerk is hereby ordered to make the Transcript of the Evidence part of the record on appeal in this case.

ENTERED this the ___ day of ___, 2000.

_____
JUDGE

APPROVED:

_____
ATTORNEY FOR THE STATE OF TENNESSEE

_____
ATTORNEY FOR THE DEFENDANT